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## Institutional Preconditions for Policy Success

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# Institutional Preconditions for Policy Success

Blake Hudson\*

*Policy failures receive much attention from the public and from policy makers adjusting policy in response to failure. Yet, lessons learned from policy failures are necessarily ex post observations. Not only has the policy failed to achieve its purposes, but a great deal of political, institutional, temporal, and economic capital has been wasted. A new body of literature on policy success undertakes ex ante analysis of successful policy designs, instrument choices, and other policy-making variables to establish a framework for more effective policy making. Though policy success may be inhibited by a variety of procedural, programmatic, or political factors, institutional analysis—and specifically constitutional constraints on a government’s ability to craft certain policy instruments—has not yet been incorporated into the policy success and various other policy studies literatures. This Article is the first to undertake that integration and demonstrates how institutional analysis in earlier stages of the policy cycle can help society avoid constitutionally driven policy failures and move toward institutional policy successes. Only when this institutional precondition is achieved will the procedural, programmatic, and political components of a policy have an opportunity to succeed.*

I.	INTRODUCTION.....	670
II.	INSTITUTIONAL VULNERABILITIES: THE GOVERNANCE COMMONS AND CONSTITUTIONAL RIGHTS .....	677
	A. <i>Allocation of Legal Authority as an Institutional Vulnerability: The Governance Commons.....</i>	677
	B. <i>Infringement of Individual Rights as an Institutional Vulnerability .....</i>	679
	C. <i>Institutional Vulnerabilities Within the Precondition Framework .....</i>	682
III.	REMEDYING INSTITUTIONAL VULNERABILITIES AS A PRECONDITION FOR POLICY SUCCESS: THE POLICY LITERATURE .....	685
	A. <i>New Institutionalism and Constitutions as “Meta- Institutions”.....</i>	687

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B.	<i>The Policy Cycle: Integrating Institutional Analysis into the Cycle</i> .....	690
C.	<i>Policy Design: Keying on Institutional Design</i> .....	694
D.	<i>Instrument Choice and Institutions: Constitutions as “Meta-Instruments” and “Policy Supersystems”</i> .....	699
E.	<i>Policy Success and Failure: Integrating Institutional Success</i> .....	704
IV.	IMPLICATIONS OF INSTITUTIONAL VULNERABILITIES FOR POLICY SUCCESS: COASTAL ZONE AND PRIVATE FOREST MANAGEMENT CASE STUDIES.....	709
A.	<i>Land Use in the Coastal Zone</i> .....	709
B.	<i>Subnational Forestry</i> .....	713
V.	CONCLUSION.....	717

*Institutions do not suddenly appear fully formed; they have to be invented.*<sup>1</sup>

## I. INTRODUCTION

In policy making, as with so many aspects of modern culture, society pays close attention to policy weaknesses and failures. Consider the recent launch of the Affordable Care Act (colloquially known as “Obamacare”). The difficulties experienced in the initial administration of the act rallied the detractors of the new health care law and equally unnerved the policy’s supporters.<sup>2</sup> It remains to be seen whether Obamacare will be considered a substantively successful policy in the vein of, for example, federal regulation of air quality under the Clean Air Act (CAA),<sup>3</sup> or rather a failure along the lines of federal government control over the airline industry.<sup>4</sup> Obamacare may very well be viewed along a spectrum, as are most policies, with some successes and some failures. Supporters may continue to promote the

1. Michael J. Trebilcock, *The Choice of Governing Instrument: A Retrospective*, in DESIGNING GOVERNMENT: FROM INSTRUMENTS TO GOVERNANCE 51, 69 (Pearl Eliadis et al. eds., 2005).

2. See Ezra Klein, *Five Thoughts on the Obamacare Disaster*, WASH. POST (Oct. 14, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/14/five-thoughts-on-the-obamacare-disaster>.

3. See J.B. RUHL, JOHN COPELAND NAGLE & JAMES SALZMAN, THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW 170 (2008).

4. See Air Transp. Ass’n of Am., *ATA Airline Handbook*, EMBRY-RIDDLE AERONAUTICAL UNIV. (June 7, 2008), <http://libraryonline.erau.edu/online-full-text/books-online/1064.pdf>.

policy as a resounding success, and detractors may continue to decry it as a perpetual failure.

Policy failure plays an important role in informing society and its governments—often painfully—of how policies can lead to unintended consequences, how existing policies can be improved, and how to engage in more effective policy making. Unfortunately, lessons learned from policy failures are necessarily *ex post* observations. For example, beginning in the 1970s, some members of the policy-making community argued that substantive environmental protection successes would result if the government proactively mandated the use of double-hulled oil tankers.<sup>5</sup> Only *after* the EXXON VALDEZ spill and the failure of the single-hulled tanker policy, however, did the U.S. government craft a double-hulled approach.<sup>6</sup> It is hardly controversial, then, to suggest that rather than forging reactionary policies as a result of policy failures, society should base policy on *ex ante* analyses of the necessary ingredients for achieving policy successes. Framed slightly differently, it is important to ask: what can be learned from arguably less enamoring studies of policy success? And how can those studies allow us to shift from reactionary, postfailure policy making to more proactive approaches modeled after proven policy successes?

A growing body of scholarship establishing a theoretical framework for “policy success” posits that we can learn more from policy success than from failure.<sup>7</sup> While this body of literature has passingly made reference to the role of institutions in, specifically, facilitating successful policies and, more generally, providing a foundational component of the policy success theoretical framework, legal institutional analysis has not made its way into this literature in any robust manner. Specifically, while scholars have obviously grappled with specific instances of policy failure due to a lack of

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5. See, e.g., M. Rosegay-Kott, Comment, *The Impediments to Effective Regulation of Oil Tanker Traffic in United States Waters*, 51 U. COLO. L. REV. 77, 97-99 (1979).

6. See Richard T. Sylves, *How the Exxon Valdez Disaster Changed America's Oil Spill Emergency Management*, 16 INT'L J. MASS EMERGENCIES & DISASTERS 13 (1998); Alaric Nightingale & Tony Hopfinger, *Valdez Ghost Haunts Exxon with Spill-Prone Ships (Update2)*, BLOOMBERG (Mar. 24, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aBINZuzlHXOM>; Samuel K. Skinner & William K. Reilly, *The EXXON VALDEZ Oil Spill: A Report to the President*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (May 1989), [http://docs.lib.noaa.gov/noaa\\_documents/NOAA\\_related\\_docs/oil\\_spills/Exxon\\_Valdez\\_NRT\\_1989\\_report\\_to\\_president.pdf](http://docs.lib.noaa.gov/noaa_documents/NOAA_related_docs/oil_spills/Exxon_Valdez_NRT_1989_report_to_president.pdf); *Spill Prevention and Response, EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL*, <http://www.evostc.state.ak.us/index.cfm?FA=facts.response> (last visited Jan. 23, 2015).

7. ALLAN MCCONNELL, UNDERSTANDING POLICY SUCCESS: RETHINKING PUBLIC POLICY 213 (2010).

constitutional authority at some level of government<sup>8</sup> or due to unconstitutional constraints on individual rights,<sup>9</sup> the key role of constitutions in laying the legal foundation of policy success is understudied. This lack of study has impeded the valuable integration of institutional analysis earlier in the policy cycle, so that policy makers have tended to learn of institutional failures via judicial assessment after a policy has been legislated, implemented, and challenged as institutionally inadequate, rather than understand how institutional structures may be adapted prior to the enactment of policies.

Policy scholars currently divide policy success into three different categories. The first is “process success,” which, of course, is exactly what it sounds like—maintaining policy-making processes and procedures that can successfully facilitate policy formulation and implementation.<sup>10</sup> Ensuring notice-and-comment rule making for substantive agency actions<sup>11</sup> under the U.S. Administrative Procedure Act is one example. Next, “program success” is the traditional way in which we might think of policy success. Program success considers the *substance* of policy rather than the procedures by which it was formed<sup>12</sup> and weighs the relative values provided by specific policies against their costs. Program success is an objective measure of outcomes evaluated relative to original policy goals and based upon evidence rather than on political ideology.<sup>13</sup> This is how one might

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8. See, e.g., Eric R. Claeys, Raich *and Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791 (2005); Blake Hudson, *Commerce in the Commons: A Unified Theory of Natural Capital Regulation Under the Commerce Clause*, 35 HARV. ENVTL. L. REV. 375, 383 n.45 (2011); Jonathan Rosenbloom, *New Day at the Pool: State Preemption, Common Pool Resources, and Non-Place Based Municipal Collaborations*, 36 HARV. ENVTL. L. REV. 445 (2012).

9. See, e.g., Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 354-61 (2005); Blake Hudson, *The Public and Wildlife Trust Doctrines and the Untold Story of the Lucas Remand*, 34 COLUM. J. ENVTL. L. 99 (2009); William Michael Treanor, *The Original Understanding of the Takings Clause 5* (Georgetown Env'tl. Law & Policy Inst. Papers & Reports, 1998), available at [http://scholarship.law.georgetown.edu/gelpl\\_papers/2/](http://scholarship.law.georgetown.edu/gelpl_papers/2/).

10. MCCONNELL, *supra* note 7, at 40-45.

11. Substantive actions as opposed to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice. See *Spirit of the Sage Council v. Norton*, 294 F. Supp. 2d 67 (D.D.C. 2003), *vacated in part* by 411 F.3d 225 (D.D.C. 2005).

12. MCCONNELL, *supra* note 7, at 45-49. The legitimacy of the policy's formation can, however, play a key role in whether it is viewed as a success or failure. *Id.* at 14. Michael Howlett has highlighted substantive and procedural aspects of policy design generally. See Michael Howlett & Raul P. Lejano, *Tales from the Crypt: The Rise and Fall (and Rebirth?) of Policy Design*, 45 ADMIN. & SOC'Y 357, 360 (2013).

13. MCCONNELL, *supra* note 7, at 49-54; see also Wayne Parsons, *From Muddling Through to Muddling Up—Evidence Based Policy Making and the Modernisation of British Government*, 17 PUB. POL'Y & ADMIN. 43 (2002) (analyzing evidence-based policy making in

analyze whether the CAA, federal regulation of the airline industry, and Obamacare may be deemed relative successes or failures. Finally, “political success” is whether the processes utilized and the programs implemented actually lead to good political outcomes for the government enacting those policies.<sup>14</sup> This is the component of policy making whereby supporters of the policy may subjectively view it as a success, and the policy’s detractors might characterize it as a failure, rather than an objective analysis of policy goals versus outcomes. True political success would engender a broader swath of support than may be garnered for policies that remain contentious over time.

While these three categories provide an extremely useful typology of policy success, the typology itself is incomplete. As this Article demonstrates, a fourth category of success is a precondition for each of the other three—“institutional success.” For a policy to be evaluated as a process, program, or political success or failure it first: (1) must be formulated by a level of government with legal authority to engage in the chosen form of policy making and (2) must not unduly infringe on the constitutional rights of the parties that it targets.

Consider these requirements for institutional success in turn. First, what if a level of government does not have the constitutional authority to pass a policy, or more specifically is found not to have that authority *after* the policy is passed and even implemented?<sup>15</sup> After all, this was the basis for the rulings in *United States v. Lopez*<sup>16</sup> and *United States v. Morrison*,<sup>17</sup> whereby the United States Supreme Court struck down federal statutes aimed at regulatory subject matter traditionally reserved for state governments under the United States Constitution and thus lying beyond the federal government’s authority. While some scholars may argue that these cases are anomalies,<sup>18</sup> that proposition simply remains unclear. Indeed, in the more recent *National*

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the Labour government’s political agenda in the United Kingdom); Ian Sanderson, *Evaluation, Policy Learning and Evidence-Based Policy Making*, 80 PUB. ADMIN. 1 (2002) (emphasizing the need for “a sound evidence base for policy”).

14. McCONNELL, *supra* note 7, at 49-54.

15. Throughout this Article, whenever constraints on governance authority are discussed, the Article is speaking strictly about governance authority to pass prescriptive regulatory policies, and not the use of voluntary, financial (subsidies and taxes), or other incentive-based policies. Those are typically available to any government without interference from other levels.

16. See 514 U.S. 549 (1995).

17. See 529 U.S. 598 (2000).

18. Professor Claeys, for example, argued that the outcome of the *Gonzalez v. Raich* case indicated that the newly born constraints on federal Commerce Clause authority arising out of *Lopez* and *Morrison* “passed from youthful exuberance to middle-aged sobriety.” Claeys, *supra* note 8, at 792; see *Gonzalez v. Raich*, 545 U.S. 1 (2005).

*Federation of Independent Business v. Sebelius*<sup>19</sup> case (regarding Obamacare), Chief Justice John Roberts went out of his way to say that the Affordable Care Act would not be constitutional under the Commerce Clause, but that it was instead constitutional under the federal power to tax.<sup>20</sup> Taken together, these relatively recent cases demonstrate that situations may yet arise where one level of government (here, federal)<sup>21</sup> is found not to maintain constitutional authority to choose a certain policy instrument. In this way, these policies may be characterized as institutional failures—at least at certain levels of government. Furthermore, as described later in this Article, this scenario plays out far more often in the context of federal preemption of state or local government legal authority or state preemption of local authority, whereby lower levels of governments would politically engage in successful policy making but are institutionally constrained from doing so.<sup>22</sup> Thus, opportunities to have policy successes undermined by “legal authority” institutional vulnerabilities abound.

Second, what if a policy is enacted and implemented, but is challenged for illegally constraining constitutionally protected rights? This is exactly the institutional vulnerability exposed in the case of *Lucas v. South Carolina Coastal Council*.<sup>23</sup> In that case, the state of South Carolina’s Beachfront Management Act,<sup>24</sup> prohibiting the development of two beachfront lots, was challenged as an unconstitutional taking of property without just compensation in violation of the Constitution’s Fifth Amendment.<sup>25</sup> The United States Supreme Court agreed, and the policy was abandoned.<sup>26</sup> The Beachfront Management Act was a case of process success because it was validly enacted and implemented by South Carolina procedures.<sup>27</sup>

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19. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

20. See *id.* at 2587, 2594; Tom Scocca, *Obama Wins the Battle, Roberts Wins the War*, SLATE (June 28, 2012, 11:59 AM), [http://www.slate.com/articles/news\\_and\\_politics/scocca/2012/06/roberts\\_health\\_care\\_opinion\\_commerce\\_clause\\_the\\_real\\_reason\\_the\\_chief\\_justice\\_upheld\\_obamacare\\_.html](http://www.slate.com/articles/news_and_politics/scocca/2012/06/roberts_health_care_opinion_commerce_clause_the_real_reason_the_chief_justice_upheld_obamacare_.html).

21. Other levels of government may be similarly constrained. See Blake Hudson & Jonathan Rosenbloom, *Uncommon Approaches to Commons Problems: Nested Governance Commons and Climate Change*, 64 HASTINGS L.J. 1273 (2013); *infra* Part II.A.

22. See Hudson & Rosenbloom, *supra* note 21; Rosenbloom, *supra* note 8.

23. 505 U.S. 1003 (1992).

24. S.C. CODE §§ 48-39-10 to 48-39-30 (2014).

25. U.S. CONST. amend. V.

26. See Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause To Promote More Efficient Regulation?*, in PROPERTY STORIES 221, 237 (Gerald Korngold & Andrew P. Morriss eds., 2004).

27. *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 896 (S.C. 1991).

It was a program success because it protected ecosystems and thus achieved outcomes matching well with its original goals.<sup>28</sup> The political success is clearly debatable, though the policy's supporters would at least characterize it as such. Even so, the policy was decidedly an institutional failure. This is a case of the "infringing on constitutional rights" category of institutional vulnerability. During the design stage of the policy, the state simply had not adequately considered the institutional (constitutional) constraints that could jeopardize the policy's success nor did it consider how to remedy those vulnerabilities *before* carrying it completely through the policy cycle.

Of course, policy successes and failures are effectively the flip side of the same coin—the same constitutional conditions that contribute to policy failure are the ones that inhibit policy success. To date, however, legal scholars have only discussed in an ad hoc fashion how constitutional constraints on governance authority have inhibited policy development.<sup>29</sup> Those ad hoc legal analyses often only occur *after* failure—that is, after a court has struck down a policy as unconstitutional due to lack of governance authority or because it infringes on constitutional rights. Without a holistic framework that integrates legal principles and institutional analysis into the design stage of the policy cycle, we will continue to see policy failures highlighted far too late and at the evaluation stage, as with the cases of *Lopez*, *Morrison*, and *Lucas*. This is very similar to the more common politically driven (rather than institutionally driven) policy failures like the EXXON VALDEZ spill, which presented ex post *evaluative* criteria indicating that the substance of a one-hulled policy was a failure when utilizing ex ante *design* criteria might have caused a shift to a double-hulled policy before the failure occurred (which would have therefore resulted in a policy success).<sup>30</sup> While ad hoc accounts of policy failures can lead to "policy learning,"<sup>31</sup> which may help with the design of future policies, a great degree of political, institutional, temporal, economic, and natural capital has already been spent on the failed policy. A better approach is to incorporate institutional analysis into the design stage of policy development, as an ex ante *component* of policy success instead of an ex post *description* of policy failure.

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28. *Id.* at 897.

29. See sources cited *supra* notes 8-9.

30. See sources cited *supra* note 6.

31. See MICHAEL HOWLETT, M. RAMESH & ANTHONY PERL, *STUDYING PUBLIC POLICY: POLICY CYCLES & POLICY SUBSYSTEMS* 6 (3d ed. 2009).



Before going further, one point of clarification should be made. Governments may fully understand the institutional vulnerabilities that can undermine a policy course of action and choose to go forward with the policy anyway. This may either be a political calculation seeking to highlight what policy makers perceive as an incorrect understanding of the institutional status quo, or rather it may be to test the waters of judicial interpretation regarding potential institutional vulnerabilities. Regardless, this Article is concerned more with unintentional institutional oversights in policy design, rather than those associated with political gamesmanship. Of course, whether a policy is the former or latter is not clear-cut, and policies likely fall along a spectrum between those extremes. Yet institutional analysis is important nonetheless to allow the most efficient use of political, institutional, temporal, and economic capital.

This Article brings into the theoretical framework of policy success the principle that a precondition for policy success is maintaining institutions that are able to fully engage in policy making without legal constraint—a task facilitated by the constitutional structure and rules of a given governance regime. Without the establishment of such preconditions, we may continue to see the failure of important policies at certain levels of government. Part II of this Article describes the institutional vulnerabilities that can inhibit policy success. Part II describes the “governance commons” that can arise when a level of government does not maintain the constitutional authority to pass a prescriptive regulatory policy, such as when the federal government does not have authority under its commerce or other powers or when state and local policies are preempted by federal or state (respectively) constitutional or legislative provisions. It also discusses how guaranteed individual rights can lead to certain policies being more institutionally vulnerable than others. Part III begins with a discussion of the importance of institutions in policy making, providing context for the Part’s subsequent review of the policy studies literature. This review walks the reader through the history of policy cycle studies, policy design, instrument choice, and policy failure to the present-day focus on policy success. Throughout each of these discussions, the Article will situate the role of constitutional institutions within these literatures in an effort to integrate that analysis into these literatures for the first time. Part IV will then briefly detail practical applications of this integration by evaluating two policy arenas where an institution’s role as a precondition for policy success will be most critical in the coming years. These areas are direct land-

use planning in the coastal zone and private forest management. Some form of prescriptive, minimum-standards policy framework may be needed in these areas in the coming decades, especially in light of challenges posed by climate change. Yet these areas are land-use regulatory roles long considered the sole prescriptive regulatory purview of state and local governments. Thus, the prescriptive regulation of each would potentially unconstitutionally curtail legal rights. As a result, understanding the role that current policy-making institutions play in such a regulatory framework's success will be critical.

## II. INSTITUTIONAL VULNERABILITIES: THE GOVERNANCE COMMONS AND CONSTITUTIONAL RIGHTS

### A. *Allocation of Legal Authority as an Institutional Vulnerability: The Governance Commons*

Recent scholarship describes the many ways in which legal governance authority in federal systems may be constrained by legislative or constitutional provisions.<sup>32</sup> In this way, federal systems of government may entrench a “governance commons,” whereby in the absence of a coordinating authority—or perhaps because higher-level authorities interfere with coordination at lower levels—numerous and disparate “rational” governments are free to act in their own short-term self-interest to the detriment of the federal system as a whole.<sup>33</sup> In other words, the constitutional structure of these systems makes them institutionally vulnerable. Though the nuance of how these complex governance commons operate is beyond the scope of this Article and is otherwise documented in the literature,<sup>34</sup> an ever-so-brief description of the most salient features of the phenomenon is provided here for context.

One iteration of the governance commons that may threaten policy success is encapsulated by the constitutional reasoning underpinning the cases of *Lopez* and *Morrison*. Those cases involved challenges to the federal government's authority to regulate subject matters that the Court found were traditionally the role of state and local governments and outside the scope of the United States Congress's Commerce Clause authority. The lynchpin of the Court's

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32. See Hudson & Rosenbloom, *supra* note 21.

33. BLAKE HUDSON, CONSTITUTIONS AND THE COMMONS: THE IMPACT OF FEDERAL GOVERNANCE ON LOCAL, NATIONAL, AND GLOBAL RESOURCE MANAGEMENT (2014).

34. See *id.*; Rosenbloom, *supra* note 8.

rulings was that the regulated activity in these cases did not involve economic activities that could be aggregated to determine whether they had a “substantial effect” on interstate commerce.<sup>35</sup> Similarly, the more recent *Sebelius* case, which tested the constitutionality of Obamacare, also called Congress’s Commerce Clause authority into question, though the health care law was upheld under the federal power to tax.<sup>36</sup> The constitutional foundation of other federal programs, such as the Clean Water Act’s section 404 wetland-fill program,<sup>37</sup> have also been questioned by the Court, at least to the extent that the Environmental Protection Agency (EPA) might utilize that program to regulate land-use activities traditionally subject to state regulatory authority.<sup>38</sup>

Another way that institutional vulnerabilities can occur is when the federal government uses its recognized authority to preempt potential policy successes at lower levels of government (state and local governments).<sup>39</sup> This happens far more often than do findings of constitutional restrictions on federal authority under Congress’s Commerce Clause or other powers.<sup>40</sup> Congressional preemption under the CAA of local government efforts to regulate mobile sources provides an example.<sup>41</sup> This is a clear case of institutional failure at the state or municipal level, but it is a failure compelled by the federal government.

Similarly, because local governments do not exist under the Constitution, state governments must empower local governments legislatively or constitutionally through the grant of “home rule” or pursuant to “Dillon’s Rule,” and states remain free to withhold or take

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35. Hudson, *supra* note 8, at 383-84.

36. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2601 (2012).

37. Clean Water Act, 33 U.S.C. § 1344 (2012).

38. See *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001).

39. S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 694 (1991); see Erwin Chemerinsky, *Empowering States: The Need To Limit Federal Preemption*, 33 PEPP. L. REV. 69 (2005); Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2004).

40. David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CALIF. L. REV. 1125, 1138 (1999). *Lopez* and *Morrison* remain the only cases since 1937 where a federal statute was struck down as beyond the scope of Congress’s constitutional authority. See, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 101 (2001).

41. See *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152 (2d Cir. 2010); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 184-87 (2006).

back some of that power through preemption.<sup>42</sup> State laws in Pennsylvania, for example, have attempted to carve out exceptions from local zoning laws for various oil- and gas-related activities, to preempt local governments from engaging in regulation of energy development, and even to transfer the power of eminent domain to natural gas corporations.<sup>43</sup> These laws have been challenged as unconstitutional by local governments.<sup>44</sup> While such challenges have been successful in Pennsylvania,<sup>45</sup> other states have successfully preempted similar local policies.<sup>46</sup> Unlike the constraints that lower-level governments can place on federal authority under Commerce Clause analysis, this is yet another compulsion of institutional vulnerability by a higher-level government.

*B. Infringement of Individual Rights as an Institutional Vulnerability*

Distinct from the question of allocating regulatory authority between levels of government, some institutional vulnerabilities arise because judicial interpretations of individual constitutional rights provisions conclude that a policy was enacted or implemented in a constitutionally impermissible manner. The Fifth Amendment of the Constitution, which states “nor shall private property be taken for public use, without just compensation,”<sup>47</sup> provides a prime example. The volume of scholarship on Fifth Amendment constraints on policy success is robust, so this Article only provides a brief example here, while Part IV expounds further on other examples salient to the coastal zone.

As noted in the Introduction, the case of *Lucas* involved a challenge to the state of South Carolina’s Beachfront Management Act (BMA), which aimed to protect the South Carolina coast from a variety of harms caused by coastal development.<sup>48</sup> Because the BMA barred David Lucas from erecting homes on his property, he brought a takings claim under the Fifth and Fourteenth Amendments of the

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42. See Hudson & Rosenbloom, *supra* note 21, at 1308-09.

43. 58 PA. CONS. STAT. §§ 2301-3504 (2012) (seeking to preempt local zoning ordinances that regulate oil and gas operations).

44. See *Energy Mgmt. Corp. v. City of Shreveport*, 467 F.3d 471 (5th Cir. 2006); *State ex rel. Morrison v. Beck Energy Corp.*, 2013-Ohio-356, 989 N.E.2d 85; *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

45. See *Robinson Township*, 83 A.3d 901.

46. See *Energy Mgmt.*, 467 F.3d 471; *Morrison*, 2013-Ohio-356, 989 N.E.2d 85.

47. U.S. CONST. amend. V.

48. S.C. CODE §§ 48-39-10 to 48-39-30 (2014); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008, 1022 n.10 (1992).

Constitution.<sup>49</sup> The Supreme Court ultimately found that any regulation that wiped out all economic value in a piece of property was categorically a “regulatory taking,” unless background principles of the state’s law of nuisance or property inhered in the property’s title.<sup>50</sup> On remand to the South Carolina Supreme Court, the state was unable to prove any such background principles applied and was therefore required to pay just compensation to Lucas.<sup>51</sup> The state paid Lucas \$850,000 for the two lots, but then, realizing it would be unable to afford implementation of a policy that required this magnitude of private landowner compensation, sold the lots and effectively gave up on its policy as originally constituted (the lots were later developed).<sup>52</sup> The lawyer for the state of South Carolina, when describing why the state pursued implementation of the policy even in the face of a takings claim, stated, “The general notion was that if you let this one go, then the Beachfront Management Act would tumble into the ocean.”<sup>53</sup> And that is exactly what happened. Indeed, South Carolina’s action sounded in Justice Holmes’s observation that “[g]overnment hardly could go on” if it had to pay for every diminution of property value caused by regulation.<sup>54</sup>

A total economic deprivation of property does not occur with frequency, and a number of “background principles” have subsequently been invoked to overcome these types of takings claims.<sup>55</sup> Nonetheless, at times—as in *Lucas*—policies do not succeed because at the evaluation stage of the policy cycle (here, the judicial stage) it is determined that the government did not have authority that it initially claimed.<sup>56</sup> While a government may have thought it could enact a

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49. *Lucas*, 505 U.S. at 1006-07.

50. *Id.* at 1029.

51. *Lucas v. S.C. Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992); *see also* Oral Argument Before the South Carolina Supreme Court on Remand from the U.S. Supreme Court’s Decision, *Lucas*, 424 S.E.2d 484 (audio recording on file with South Carolina Supreme Court Library) (failing to persuade the court that the construction of a home on fragile beach land constituted a nuisance); Hudson, *supra* note 9 (discussing the *Lucas* remand).

52. *See* Been, *supra* note 26, at 221.

53. DVD: *Lucas v. South Carolina Coastal Council* at 12:50 (Duke University School of Law 2005), *available at* <http://web.law.duke.edu/voices/lucas>. One of the lawyers working for Lucas even described the South Carolina Supreme Court’s ruling in favor of the state prior to the U.S. Supreme Court hearing as encapsulating the following logic: “if we rule . . . with ‘em . . . we are going to either gut this act . . . or we are going to break the state.” *Id.* at 17:30.

54. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

55. *See* Blumm & Ritchie, *supra* note 9.

56. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

regulation without paying compensation, it may be required to do so after constitutional challenge. If the government does not have the revenue to compensate (and perhaps even if it does), then its institutional miscalculation will lead to process, program, and political failure.

In fact, the way in which the constitutional rights institutional vulnerability may be exposed with more regularity is a chilling of regulatory policy-making efforts by governments out of concern that challenged policies will fail at the evaluation stage if courts order regulatory takings compensation.<sup>57</sup> Take, for example, Oregon's referendum Measure 37, which required either compensation for the adverse economic effects of regulations or a government waiver of enforcement of the regulations.<sup>58</sup> A study of the effects of Measure 37 found that in virtually every instance of a claim of diminution of property value due to regulation, the government granted a waiver.<sup>59</sup> This is institutional failure.

While there are certainly competing values provided by the Takings Clause in the form of property rights protections, some scholars question whether the Constitution supports a regulatory takings doctrine at all.<sup>60</sup> In this sense, perhaps the institutional failure can be an inappropriate application of a constitutional rule or the creation of constitutional rules that are not fully supported by the Constitution (at least in the view of some constitutional scholars).

Ultimately, constitutional provisions protecting individual rights play a role in undermining process, program, and political policy success. These institutional constraints on policy success should be integrated more thoroughly into the literature so that institutional vulnerabilities can be remedied at the policy design stage, rather than

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57. See Tim Mulvaney, *Takings Case Set for Oral Argument at the SCOTUS on January 15th*, ENVTL. L. PROF. BLOG (Jan. 13, 2013), [http://lawprofessors.typepad.com/environmental\\_law/2013/01/takings-case-set-for-oral-argument-at-the-scotus-on-january-15th-.html](http://lawprofessors.typepad.com/environmental_law/2013/01/takings-case-set-for-oral-argument-at-the-scotus-on-january-15th-.html).

58. John D. Echeverria, *Property Values and Oregon Measure 37: Exposing the False Premise of Regulation's Harm to Landowners*, GEO. ENVTL. L. & POL'Y INST. 4 (2007), [http://www.gelpi.org/gelpi/current\\_research/documents/GELPIMeasure37Report.pdf](http://www.gelpi.org/gelpi/current_research/documents/GELPIMeasure37Report.pdf). Measure 37 has since been significantly limited in application by Measure 49. See *Measure 49 Guide*, OR. DEP'T LAND CONSERVATION & DEV. (Mar. 7, 2008) [http://www.oregon.gov/LCD/MEASURE49/docs/general/m49\\_guide.pdf](http://www.oregon.gov/LCD/MEASURE49/docs/general/m49_guide.pdf).

59. Echeverria, *supra* note 58.

60. Treanor, *supra* note 9, at 1; see also PETER M. GERHART, *PROPERTY LAW AND SOCIAL MORALITY* 286-90, 299-310 (2014) (arguing that property regulations that do not affect private owners' ability to exclude others from the use of their property do not constitute "takings" under the Fifth Amendment and therefore should not be subject to the amendment's compensation requirement).

at the evaluation stage through judicial review. The next Subpart provides a mechanism for evaluating the role of each of the institutional vulnerabilities described above in inhibiting policy success.

*C. Institutional Vulnerabilities Within the Precondition Framework*

Prior research provides a framework useful for depicting how the institutional vulnerabilities described in this Part can undermine policy success.<sup>61</sup> A modified version of this framework is shown *infra* Figure 1. As discussed *infra* Part III.B., the policy cycle has been studied in detail, breaking out policy making into stages of agenda setting, policy formulation, decision making, implementation, and policy evaluation. Even so, scant attention has been given to the overarching framework in which this cycle operates. Though somewhat oversimplified, at the most fundamental level policy success requires the presence of four components: (1) institutional capacity of the government to formulate policy, (2) political will of the government to formulate policy, (3) institutional capacity of the government to implement policy, and (4) political will of the government to implement policy. These components intersect as shown in Figure 1. The presence of all four components indicates a policy success. When institutional capacity to formulate and institutional capacity to implement intersect, we have a sufficient policy-making institution. When political will to formulate and political will to implement intersect, we have sufficient policy-making political will. Similarly, a government may have both institutional capacity and political will to formulate policy, which results in successful policy formulation, but it may not have institutional capacity and political will to implement, which can undermine an otherwise duly constituted policy's success. On the other hand, perhaps there are sufficient institutions and sufficient political will to implement, leading to successful policy implementation, but the policy itself has institutional flaws (lack of component 1) or was crafted in a politically ineffectual way (lack of component 2). In this way, all four components must be present before policy success can occur.

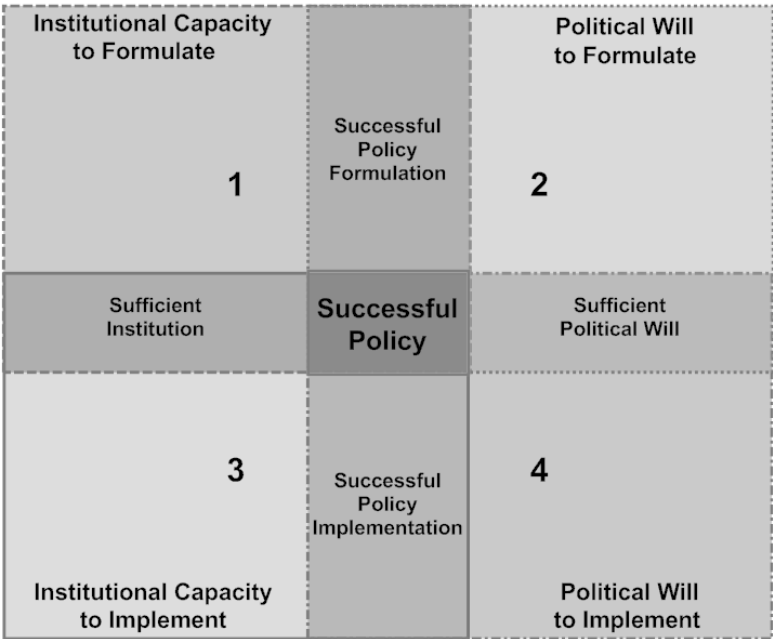
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61. See Blake Hudson, *Federal Constitutions, Global Governance, and the Role of Forests in Regulating Climate Change*, 87 IND. L.J. 1455 (2012) [hereinafter Hudson, *Regulating Climate Change*]; Blake Hudson, *Federal Constitutions: The Keystone of Nested Commons Governance*, 63 ALA. L. REV. 1007 (2012) [hereinafter Hudson, *Nested Commons Governance*]; HUDSON, *supra* note 33.

The allocation of governance authority among levels of government cuts right to the core of component 1. Without authority to prescriptively regulate, for example, it does not matter if political will to formulate a policy exists in combination with political will and institutional capacity to implement. Constitutional infringement, on the other hand, more clearly falls into the component 3 category. For example, in the property context the government may very well have had the institutional capacity to formulate the policy (i.e., the legal authority, component 1), but does not have the institutional capacity to implement the policy if it must award just compensation in order to make the policy a process and program success.

Figure 1.

Four Components of Policy Formulation and Implementation:  
Preconditions for Policy Design and Success



Consider some examples that drive home the utility of the framework. First, an example of policy success in the United States—the CAA.<sup>62</sup> The Commerce Clause provides federal regulatory authority over regulation of industrial air pollutants (component 1), and Congress successfully acted on its political will to regulate those

62. Clean Air Act, 42 U.S.C. §§ 7401-7671(q) (2012).



pollutants by passing the CAA (component 2). The EPA then successfully exercised its administrative authority and also enlisted state government support in implementing the CAA, which provides sufficient institutional capacity to enforce the act (component 3). Finally, though enforcement of any statute like the CAA may be improved, there also exists sufficient political will to enforce the CAA (component 4), as demonstrated by the continued monitoring and enforcement actions performed by administrative agencies implementing the statute. The presence of these four components has resulted in a successful process, program, political, and, importantly, *institutional* success: the CAA has sound procedural mechanisms for carrying out its dictates (process success); air quality in the United States has improved greatly since the passage of the CAA and continues to improve (program success); the CAA is widely accepted as a valuable and successful regulatory program (political success); and the authority of the federal government to formulate and implement the CAA stands on strong ground (institutional success).

Next, consider the cases of *Lopez* and *Morrison*. In those cases, Congress, believing it had the institutional authority to formulate the policies in question (component 1), acted on its political will to formulate policy by passing the Gun-Free School Zones Act and the Violence Against Women Act, respectively (component 2).<sup>63</sup> The institutional capacity and political will to implement these policies existed (components 3 and 4). And yet even after the government had implemented them, an ex post challenge to component 1 resulted in a finding that component 1 did not exist. The lack of institutional capacity (and thus institutional success) created process, program, and political failures for these statutes.

What about federal preemption, such as our example of mobile sources under the CAA? In *Metropolitan Taxicab Board of Trade v. City of New York*, the city thought it had institutional capacity to formulate a policy mandating heightened fuel efficiency standards for its taxi fleet (component 1).<sup>64</sup> It crafted a policy to do so out of its political will to formulate policy (component 2) and presumably maintained the institutional capacity and political will to implement the policy (components 3 and 4). Yet, the federal government stepped in and preemptively declared that the city did not have component 1, and the United States Court of Appeals for the Second Circuit agreed,

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63. See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

64. 615 F.3d 152 (2d Cir. 2010).

thus forcing institutional failure at the municipal level.<sup>65</sup> Similarly, state governments may preempt or inhibit institutional capacity to formulate policy, as have states establishing that local governments do not maintain component 1 in the context of natural gas fracking regulation.<sup>66</sup>

Finally, consider the *Lucas* case. The state of South Carolina maintained the institutional enforcement capacity to pass the BMA (component 1) and did so via political will to formulate policy (component 2).<sup>67</sup> For a time, it maintained institutional capacity to enforce (component 3) because it did not have to compensate landowners for the restrictions placed on private property rights.<sup>68</sup> The state also maintained the political will to implement the policy (component 4), as evidenced by the results the policy achieved on the ground, particularly as applied to Lucas (prohibition of development of his lots).<sup>69</sup> Yet, after a judicial ruling declaring that the regulation was a taking of property for which just compensation was owed, South Carolina quickly realized it did not have the institutional capacity to implement the policy (component 3)—it simply could not administratively afford to pay every property owner affected by the policy.<sup>70</sup> Thus, the policy's process, program, and political success were compromised by an institutional vulnerability.

Having detailed the primary types of institutional vulnerabilities that can hamstring policy success and raised a few examples of how they may arise, the next Part sets to task incorporating the role of institutions more fully into the policy literature—culminating with their key role in contributing to policy success.

### III. REMEDYING INSTITUTIONAL VULNERABILITIES AS A PRECONDITION FOR POLICY SUCCESS: THE POLICY LITERATURE

*[U]nless we . . . can offer clear theories of how . . . institutions[] and policy are connected and deduce predictions from these theories, we shall simply be telling ad hoc stories.*<sup>71</sup>

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65. *Id.*

66. *See* Energy Mgmt. Corp. v. City of Shreveport, 467 F.3d 471 (5th Cir. 2006); State *ex rel.* Morrison v. Beck Energy Corp., 2013-Ohio-356, 989 N.E.2d 85.

67. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

68. *See id.*

69. *See id.*

70. *See id.*

71. David W. Brady, *The Causes and Consequences of Divided Government: Toward a New Theory of American Politics?*, 87 AM. POL. SCI. REV. 189, 194 (1993).

To understand the role of constitutional institutions in policy success it is useful to first ask: what is policy study and why is it important? Most simply, "public policy" is "whatever governments choose to do or not to do."<sup>72</sup> William Jenkins provided a more detailed definition, describing public policy as "'a set of interrelated decisions taken by a political actor or group of actors concerning the selection of goals and the means of achieving them within a specified situation *where those decisions should, in principle, be within the power of those actors to achieve.*'"<sup>73</sup> This last part of Jenkins's definition is where constitutional allocation of governance authority and the ability of governments to act without violating constitutionally protected rights come into play. Indeed, Jenkins's work acknowledges that "a government's *capacity* to implement its decisions is also a significant component of public policy" and that "limitations on a government's ability to act can constrain the range of options considered in particular decision-making circumstances or can contribute to the success or lack of success of policy-making efforts."<sup>74</sup> Most of these limitations have been described by policy scholars as including financial, personnel, and informational resource limitations; limitations imposed by international obligations; or limitations imposed by domestic politics.<sup>75</sup> On the other hand, domestic institutions and legal structures seem to have been largely overlooked in this literature.

The remainder of this Part describes more fully how institutions fit within the many subdisciplines of policy study. While there is no perfect order in which to proceed, the Subparts below review the most relevant primary subdisciplines of policy study and detail in particular the limited institutional analysis that has been undertaken in those areas (at least with regard to legal institutions). This survey of policy studies literature highlights the repeated absence of analysis of how constitutional institutions allocate governance authority among levels of government or may be constrained by individual rights considerations. The Part makes an initial attempt to integrate that analysis into the theoretical framework of policy studies.

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72. THOMAS R. DYE, UNDERSTANDING PUBLIC POLICY 1 (1972).

73. HOWLETT, RAMESH & PERL, *supra* note 31, at 6 (emphasis added) (quoting W.I. JENKINS, POLICY ANALYSIS: A POLITICAL AND ORGANIZATIONAL PERSPECTIVE 15 (1978)).

74. *Id.*

75. *Id.*

A. *New Institutionalism and Constitutions as “Meta-Institutions”*

Analysis of the institutions that engage in public policy making has been said to be the “broadest perspective” in policy studies.<sup>76</sup> Even so, such analysis typically focuses on the structure of political and economic systems through the review of bureaucracy, legislatures, and courts.<sup>77</sup> These institutions in the United States, however, are embedded within a legal, institutional superstructure—that is, the text of the Constitution and the canon of constitutional law interpreting its provisions. We can therefore call constitutional law a meta-institution<sup>78</sup> that subsumes all of the typical institutions reviewed in policy studies, such as those arising out of the executive, the legislature, and the judiciary.

Institutions have long been seen to “*influence* actions by shaping the interpretation of problems and possible solutions by policy actors, and by constraining the choice of solutions and the way and extent to which they can be implemented.”<sup>79</sup> Recently, however, scholars have renewed their interest in the role of institutions in policy making, but with a slightly expanded focus. Scholars of “new” (or “neo”) institutionalism take the perspective that institutions are independent variables that shape policy outcomes<sup>80</sup> and “seek[] to identify how rules, norms, and symbols affect political behaviour; how the configuration of governmental institutions affects what the state does; and how unique patterns of historical development can constrain subsequent choices about public problem-solving.”<sup>81</sup> Neoinstitutionalism literature has at least cursorily referenced federalism and individual rights protections (such as property rights).<sup>82</sup> Even so, rigorous examination of constitutional governance constraints has not

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76. *Id.* at 31.

77. *Id.*

78. *See id.* at 52.

79. *Id.* at 44; *accord id.* at 262; James G. March & Johan P. Olsen, *Institutional Perspectives on Political Institutions*, 9 GOVERNANCE 247 (1996) (published version of the Address before the International Political Science Association in Berlin).

80. Trebilcock, *supra* note 1, at 69; *see also* MICHAEL M. ATKINSON, GOVERNING CANADA: INSTITUTIONS AND PUBLIC POLICY (1993) (examining the structure and impact of political institutions in Canada); DO INSTITUTIONS MATTER? (R. Kent Weaver & Bert A. Rockman eds., 1993) (discussing and comparing political institutions in the United States with other parliamentary systems); POLICY STUDIES IN CANADA: THE STATE OF THE ART (Laurent Dobuzinskis, Michael Howlett & David Laycock eds., 1996) (discussing the past, present, and future of policy studies in Canada).

81. HOWLETT, RAMESH & PERL, *supra* note 31, at 44 (citation omitted); *accord* Fritz W. Scharpf, *Institutions in Comparative Policy Research*, 33 COMP. POL. STUD. 762 (2000).

82. *See* sources cited *supra* notes 80-81.

made its way into this literature.<sup>83</sup> Despite this lack of attention, it is clear that with constitutional institutions “the organization and character of . . . institutions play a critical role in determining policy outcomes.”<sup>84</sup> It has been said that “[i]nstitutions do not suddenly appear fully formed; they have to be invented.”<sup>85</sup> While this is definitely true for agencies, legislatures, and courts, how much more so is it true of constitutions, the mother of all other institutions?

Neoinstitutionalism builds off of institutionalism’s primary focus on formal rules and extends to study the role of power, values, and, most importantly for this Article, how the past is a “prime shaper of the future.”<sup>86</sup> It has not gone entirely unnoticed in the literature that institutions include “legal . . . codes and rules that affect how individuals and groups calculate optimal strategies and courses of action.”<sup>87</sup> Yet, constitutional rules established largely at the outset of our nation are perhaps the most important shaper of the future of U.S. policy, and each federal system maintains a unique pattern of historical development that constrains policy making to varying degrees. Neoinstitutionalists argue: “[S]tate institutions assume a privileged role in the explanation of policy outputs. They represent a ‘crystallization’ of the effects of economic factors, ideas, and interests, and they constitute the primary vehicle through which these factors are brought to bear on policy . . . .”<sup>88</sup> Indeed, this seems especially true of federalism, whereby strong notions of a need for decentralization (driven by economic, political, and cultural considerations) remain embedded deeply within the institutional structure, as do economic, political, and cultural perspectives that inform views on property rights and associated doctrines, like regulatory takings. Though it is true that these institutions “also generate ideas and interests through a process of institutional evolution over time,”<sup>89</sup> the crystallization of ideas that occurred long ago—dating back to the Federalist/Anti-Federalist

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83. Trebilcock, *supra* note 1, at 69.

84. *Id.*

85. *Id.*

86. McCONNELL, *supra* note 7, at 223.

87. HOWLETT, RAMESH & PERL, *supra* note 31, at 44 (citation omitted); accord Elinor Ostrom, *Institutional Rational Choice: An Assessment of the Institutional Analysis and Development Framework*, in THEORIES OF THE POLICY PROCESS 35 (Pail A. Sabatier ed., 1999).

88. NINETTE KELLEY & MICHAEL TREBILCOCK, THE MAKING OF THE MOSAIC: A HISTORY OF CANADIAN IMMIGRATION POLICY 11 (2d ed. 2010).

89. *Id.*

debates at the Constitutional Convention in the United States—can lead to a policy-making rigidity that is hard to overcome.<sup>90</sup>

Indeed, the Constitution provides good study for “statist” theory. It creates institutional inertia by allocating governance authority between federal and state governments in a certain manner and by setting rules for the protection of individual rights. When courts interpret the Constitution, this inertia gains energy and becomes entrenched further over time. Theories of “statism” stand for the proposition that “each political system has an underlying logic and a matching set of interrelated institutions that foster certain choices and hinder others.”<sup>91</sup> Some scholars of public policy note that under a statist view, “institutions can only rarely be . . . modified[] or replaced without a considerable degree of effort.”<sup>92</sup> This is certainly the case with constitutions. In the United States, the unique pattern of historical development of constitutional rules regarding certain subject areas, like land-use planning and subnational forestry, most certainly affect policy making across scales in those areas. In this way, constitutional institutions may be the poster child for “path dependency,” which stands for the premise that “in policy-making, ‘history matters’.”<sup>93</sup> Path dependency posits that “new decisions are shaped and constrained by increasing returns generated by the costs of continuing with existing trajectories and the high costs of alternative trajectories.”<sup>94</sup> Constitutions perhaps form the basis for some of the most stringent forms of “policy legacies,” which show that “once a system is in place, it tends to perpetuate itself by limiting the range of choices or the ability of forces both outside (‘exogenous’) and inside (‘endogenous’) the system to alter that trajectory.”<sup>95</sup>

Despite the fact that institutions like constitutions are hard to change, they need to be understood as a key component of policy success theory. Failure to recognize institutional success as a precondition for process, program, and political policy success will inhibit policy makers’ and advocates’ ability to identify what types of

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90. Though ideas and values may have shifted toward a desire to change the constitutional status quo, they may not have shifted enough to meet the “super-supermajority” thresholds required for institutional reforms. See *infra* text accompanying note 170.

91. HOWLETT, RAMESH & PERL, *supra* note 31, at 45; accord *Introduction to Varieties of Capitalism*, in *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* 1, 1 (Peter A. Hall & David Soskice eds., 2001).

92. HOWLETT, RAMESH & PERL, *supra* note 31, at 52.

93. *Id.* at 200.

94. MCCONNELL, *supra* note 7, at 223; accord Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000).

95. HOWLETT, RAMESH & PERL, *supra* note 31, at 200.

institutional alterations are needed—either through constitutional amendment or judicial interpretation. In contrast, recognizing institutional vulnerabilities will help policy makers alter policy-instrument choice to the extent that such vulnerabilities cannot be overcome at the time of policy design, such as through choosing incentive-based instruments over prescriptive ones.

*B. The Policy Cycle: Integrating Institutional Analysis into the Cycle*

Policy studies have historically focused on the series of stages through which policy making occurs—known as the “policy cycle.”<sup>96</sup> These stages are often set out in a linear fashion as a discrete series of sequential steps. Over time, however, the term “cycle” has become a preferred descriptor, because the stages do not always occur linearly, but rather can occur nonsequentially with each stage often feeding back into an earlier stage of the cycle.

One of the early pioneers of policy studies, Harold Lasswell, divided the policy-making process into seven stages,<sup>97</sup> and he was followed by numerous scholars who slightly modified his original stages but maintained the overall “logic” of analysis.<sup>98</sup> Ultimately, the logic of modern policy studies distills the policy cycle into five stages: (1) agenda setting,<sup>99</sup> (2) policy formulation, (3) decision making, (4) policy implementation, and (5) policy evaluation.<sup>100</sup>

The policy cycle approach has been touted as providing more clarity to the dynamics of policy making by breaking policy processes into discernable components that can be studied with more focus.<sup>101</sup> These disaggregated components may also be studied relative to each other to determine the drivers of policy success or failure.<sup>102</sup> The approach has been touted as flexible enough to analyze policy across virtually all scales, from local governments to international regimes,<sup>103</sup>

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96. *Id.* at 92.

97. MICHAEL HOWLETT, *DESIGNING PUBLIC POLICIES: PRINCIPLES AND INSTRUMENTS* 18 (2011); *see also* HAROLD D. LASSWELL, *A PRE-VIEW OF POLICY SCIENCES* (1971) (discussing the development and impact of policy sciences).

98. *See* HOWLETT, *supra* note 97, at 18.

99. Peters and Hoornbeek describe agenda setting as primarily assessing “what is the problem?” B. Guy Peters & John A. Hoornbeek, *The Problem of Policy Problems*, in *DESIGNING GOVERNMENT: FROM INSTRUMENTS TO GOVERNANCE*, *supra* note 1, at 77, 83.

100. HOWLETT, *supra* note 97, at 18-19; *see also* HOWLETT, RAMESH & PERL, *supra* note 31, at 3 (explaining how the policy cycle can be broken into successive stages).

101. HOWLETT, RAMESH & PERL, *supra* note 31, at 13.

102. *Id.*

103. *Id.*

and to facilitate the study of a number of nongovernmental actors in the policy cycle, including private organizations and citizens.<sup>104</sup>

Michael Howlett and other policy scholars have described the stages of the policy cycle as “sequential policy cycle[s] [that] set out the basic steps through which policy processes unfold” and asserted that the study of “successive iterations of the cycle” will help “improve upon policy outcomes.”<sup>105</sup> This improvement has become known as “policy learning.”<sup>106</sup> Though policy learning might typically be thought of as learning about which instruments of implementation do or do not work to various degrees, we can also understand institutional analysis as an important component of policy learning—whereby analysts study the constitutional vulnerabilities that allow or constrain other instrument choice options and apply those lessons to future policy-making efforts. Sometimes, there may be no learning that can help improve a policy. Rather, there may only be recognition that one level of government cannot utilize certain policy instruments due to a lack of constitutional authority. But this is an equally important observation to glean from policy studies. Scholars have noted as much by acknowledging that at times entire policy regimes can fail.<sup>107</sup> Lack of constitutional authority to engage in policy making or a policy’s violation of constitutional rights can be a contributor to such regime failure.

A potential criticism of the policy cycle approach, of course, is that characterization as a cycle suggests that policy making typically proceeds in a progressive, systematic fashion, which is often not the case.<sup>108</sup> Policy making may be reactionary rather than proactive, may skip phases, and may otherwise occur in a nonlinear fashion.<sup>109</sup> Howlett notes, “The cycle may not be a single iterative loop, for example, but rather a series of smaller loops in which, to cite just one possibility, the results of past implementation decisions may have a major impact on future policy formulation . . . .”<sup>110</sup> One of these

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104. *Id.*

105. *Id.* at 3.

106. *Id.*

107. *Id.* at 182.

108. *Id.* at 13.

109. *See id.* at 285; DEBORAH A. STONE, *POLICY PARADOX AND POLITICAL REASON* 9 (1988); Laurence H. Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66 (1972); Arco Timmermans & Ivar Bleiklie, *Institutional Conditions for Policy Design: Types of Arenas and Rules of the Game*, EUR. CONSORTIUM FOR POL. RES. (Mar. 1999) <http://ecpr.eu/Filestore/PaperProposal/d24abcd8-1d52-4db9-a1e8-1743bb9c88e4.pdf> (paper presented at the European Consortium of Political Research, Joint Sessions of Workshops, Mannheim).

110. HOWLETT, RAMESH & PERL, *supra* note 31, at 13-14.



smaller loops might occur, for example, due to a judicial ruling that takes place in the evaluation stage. As detailed in Part II.C, the agenda may have been set, the policy formulated and implemented, and only afterwards does judicial evaluation determine that there was no legislative authority to formulate the policy in the first instance, thus resetting the cycle to a prior stage in the loop. In this way, it is true that “[a] better model is needed that delineates in greater detail the actors and institutions involved in the policy process, helps identify the instruments available to policy-makers, and points out the factors that lead to certain policy outcomes rather than others.”<sup>111</sup> Integrating institutional analysis earlier in the cycle and highlighting vulnerabilities that can undermine institutional success may increase the chances of achieving better outcomes, avoiding the need to abandon policies because their unconstitutionality renders their process, program, or political success meaningless. It is therefore important to ask: where is institutional analysis most valuable in the five stages of the policy cycle? The answer is at the policy formulation, decision-making, and evaluation stages, described in turn below.

As scholars have acknowledged, “Policy formulation . . . involves identifying both the technical and political constraints on state action.”<sup>112</sup> Constitutional constraints would be a technical constraint under this categorization. Other scholars have described these types of institutional constraints, and in particular constitutional provisions in federal systems, as procedural constraints manifesting during the policy formulation stage.<sup>113</sup> Thorough consideration of such constraints may lead to significant changes in the substance of a policy—how a government plans to handle potential regulatory takings and just compensation claims, for example.

Similarly, the decision-making stage is the stage in which policy makers make choices about precisely what action (or even inaction) the government will pursue. Undertaking institutional analysis may compel inaction, or it may lead to a choice not to pursue prescriptive regulatory instruments until the institutional vulnerability can be remedied. Understanding potential institutional constraints on the

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111. *Id.* at 14 (citation omitted); accord Daniel A. Mazmanian & Paul A. Sabatier, *A Multivariate Model of Public Policy-Making*, 24 AM. J. POL. SCI. 439 (1980).

112. HOWLETT, *supra* note 97, at 30 (citation omitted); accord Peter J. May, *Hints for Crafting Alternative Policies*, 7 POL’Y ANALYSIS 227 (1981); Mara S. Sidney, *Policy Formulation: Design and Tools*, in HANDBOOK OF PUBLIC POLICY ANALYSIS: THEORY, POLITICS, AND METHODS 79 (Frank Fischer, Gerald J. Miller & Mara S. Sidney eds., 2007).

113. HOWLETT, RAMESH & PERL, *supra* note 31, at 113.

policy chosen can have a significant impact on its viability and potential for success. Yet, institutional analysis is often overlooked in the design stage, leaving the evaluation stage as the next step in the cycle where any institutional vulnerabilities are likely to be exposed.

The evaluation stage of the policy cycle<sup>114</sup> is the stage where we might hope to avoid questions of whether there is or is not institutional success. In other words, if that question is seriously in doubt by the time a policy reaches the evaluation stage—that is, when a judicial review of a policy’s constitutionality takes place—then a finding of institutional failure will be yet another ex post observation and a waste of political, economic, temporal, and other resources. Generally, the evaluation stage is most important for the “policy learning” opportunity that it provides. As policy scholars have argued:

[P]erhaps the greatest benefits of policy evaluation are not the direct results it generates in terms of definitive assessments of the success and failure of particular policies per se, but rather the educational dynamic that it can stimulate among policy-makers as well as others less directly involved in policy issues.<sup>115</sup>

In other words, “[I]mprovements or enhancements to policy-making and policy outcomes can be brought about through careful and deliberate assessment of how past stages of the policy cycle affected both the original goals adopted by governments and the means implemented to address them.”<sup>116</sup> This is most true for process, program, and political success analysis because the relative failures and successes of policy form the basis of trial-and-error policy experiments that can be improved upon over time.<sup>117</sup> Peter Hall frames this as “endogenous learning,” which he describes as “a deliberate attempt to adjust the goals or techniques of policy in response to past experience and new information” so as to better attain the ultimate

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114. Policy scholars have noted that judicial review may be important to assess constitutional provisions related to executive administration of law and even those related to the second category of institutional vulnerability highlighted in this Article—an infringement on individual rights. *Id.* at 189. No mention is made, however, of the allocation of governance authority to specific levels of government. See Peter D. Jacobson, Elizabeth Selvin & Scott D. Pomfret, *The Role of the Courts in Shaping Health Policy: An Empirical Analysis*, 29 J.L. MED. & ETHICS 278 (2001) (analyzing how courts shape health policy).

115. HOWLETT, RAMESH & PERL, *supra* note 31, at 179 (citation omitted).

116. *Id.* at 180 (citations omitted).

117. *Id.*

objects of governance.<sup>118</sup> Thus, policy learning through evaluation can help us understand why some policies succeed and others fail.<sup>119</sup>

Yet, an evaluative judicial ruling that finds an institutional failure most likely means that the policy must be abandoned. While this is useful for helping policy makers understand that the policy should never have been crafted in its then-current form or that the instrument originally utilized will no longer be an option, it amounts to a complete evisceration of the process, program, and political success that might otherwise have been achieved by the policy. If a judicial body determines that a level of government does not have constitutional authority to enact a policy or unconstitutionally infringes on individual rights, then policy makers are effectively back to square one—the agenda-setting stage. In this situation, a new cycle may involve the crafting of a nonprescriptive policy at that level of government.<sup>120</sup> That policy, in turn, may be unable to achieve robust program success, which may be why a prescriptive approach was chosen to begin with. Or perhaps the policy just ceases to exist in prescriptive or nonprescriptive form and is thus “terminated” no matter how important the policy’s programmatic goals may have been.<sup>121</sup>

It is clearly important to integrate institutional considerations into policy cycle studies to better understand how issues like constitutional authority impact each stage. Even so, as discussed in the next Subpart, institutional analysis should not be undertaken only in a vacuum regarding each stage, but rather should be integrated into a broader perspective of how we design policies from the time they are conceived until the time they are implemented and evaluated.

### C. *Policy Design: Keying on Institutional Design*

Understanding exactly how instrument choices are constrained by higher-order sets of variables is thus crucial to making correct policy design decisions in specific policy-making contexts.<sup>122</sup>

While the policy cycle might be thought of as analyzing each of the iterative stages of the policy-making process, policy design may be conceived more broadly as the study of how to create policies that effectively integrate each stage. Policy design studies also assess

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118. Peter A. Hall, *Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain*, 25 COMP. POL. 275, 278 (1993).

119. HOWLETT, RAMESH & PERL, *supra* note 31, at 180.

120. *Id.* at 191.

121. *Id.*

122. HOWLETT, *supra* note 97, at 14.

whether and how the overarching design of policy effectuates success at each stage and as a result, success of the policy as a whole. Even though policy design is the overarching structure in which policy making takes place, it has received far less attention in the literature than its constituent components of agenda setting; instrument choice; and policy formulation, implementation, and evaluation.<sup>123</sup> Though it may be housed within the study of governance more broadly, Howlett argues that governance studies have occurred “without the benefit of clear and systematic analysis” of policy design.<sup>124</sup> Howlett posits that such study is warranted because “the purpose and expectations of policy design have always been clear[—]improving policy-making and policy outcomes through the accurate anticipation of the consequences of government actions.”<sup>125</sup>

How then do institutions, like constitutions, figure into the larger study of policy design and, specifically, designs that facilitate successful policies?<sup>126</sup> The answer is that constitutions are the ultimate “designers” of policy in that they establish the ground rules for how subsidiary governmental entities may formulate policy, like legislatures at one or more levels of government. They also set the ground rules for permissible or impermissible government actions, such as the taking of property without just compensation. The policy design literature contemplates policy design’s codependence with the institutions that effectuate its purpose, because “policy design is very much situated in the ‘contextual’ orientation which is characteristic of modern policy science. That is, it is an activity or set of activities which takes place within a specific historical and institutional context that largely determines its content.”<sup>127</sup>

Indeed, one of the preconditions for policy design success is “the need for designers to thoroughly analyze and understand the ‘policy space’ in which they are working” because “policy formulation typically occurs within the confines of an existing governance mode

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123. HOWLETT, RAMESH & PERL, *supra* note 31.

124. HOWLETT, *supra* note 97, at 3 (citation omitted).

125. *Id.* (citations omitted); accord JAN TINBERGEN, *THE DESIGN OF DEVELOPMENT* (1958); J. TINBERGEN, *ECONOMIC POLICY: PRINCIPLES AND DESIGN* (1956); D.A. Schön, *Designing as Reflective Conversation with the Materials of a Design Situation*, 5 KNOWLEDGE-BASED SYS. 3 (1992).

126. Though some accounts within the public policy literature highlight the role of law in the design of public policy, they focus primarily on “private and public law; private civil or tort law and common law; [and] public criminal and administrative law.” HOWLETT, *supra* note 97, at 85. There is no substantive discussion of the role of constitutional law within these discussions.

127. *Id.* at 4 (citations omitted).

and policy logic which simplifies the task of policy design.”<sup>128</sup> Even so, success of specific policies will occur “only if these contextual constraints are diagnosed accurately,”<sup>129</sup> and “[u]nderstanding exactly how instrument choices are constrained by higher-order sets of variables is thus crucial to making correct policy design decisions in specific policy-making contexts.”<sup>130</sup> In particular, studying success in an institutional context might help a governance society avoid “lock-in,” which results when “institutional feedback mechanisms are self-reinforcing and, therefore, reforms will tend to follow established patterns.”<sup>131</sup>

Howlett implicitly hints at the impacts of federal governance on policy design: “Adopting a multi-level, nested model of policy context helps clarify what ‘room’ exists at what level of policy for new or alternative policy design elements.”<sup>132</sup> The clarity that multilevel, nested federal systems provide regarding the “room” that each level of government maintains is not always clear.<sup>133</sup> Nonetheless, in many instances it is fairly clear (or at least constitutionally debatable) that certain levels of government *do not* maintain the legal authority to utilize certain instruments, such as prescriptive regulation. This is the institutional context within which certain policies are designed in federal systems like those of the United States and Canada.

Howlett argues that there are three fundamental aspects to policy design: “(1) knowledge of the basic building blocks or materials with which actors must work in constructing a (policy) object; (2) the elaboration of a set of principles regarding how these materials should be combined in that construction; and (3) understanding the process by which a design becomes translated into reality.”<sup>134</sup> The study of constitutional authority in federal systems falls under the first and second aspects, which basically entail “understanding the nuances of policy formulation,”<sup>135</sup> and also impacts the third aspect because

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128. *Id.* at 141.

129. *Id.* (citing Louis Meuleman, *The Cultural Dimension of Metagovernance: Why Governance Doctrines May Fail*, 10 PUB. ORG. REV. 49 (2010)).

130. *Id.*

131. MCCONNELL, *supra* note 7, at 210.

132. HOWLETT, *supra* note 97, at 142 (citation omitted).

133. For example, there is great debate under provisions of the U.S. Constitution, such as the Commerce Clause, about whether the federal government, state governments, or both maintain constitutional authority to prescriptively regulate resources like isolated wetlands. *See* Rapanos v. United States, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001).

134. HOWLETT, *supra* note 97, at 139.

135. *Id.*

institutional factors that complicate policy formulation prevent certain policy designs from becoming reality. Indeed, we might actually say that the study of *institutional design* is a precondition of the study of *policy design*, because the latter is wholly dependent upon the design of institutions from which policy emanates. In other words, just as institutional authority is a precondition to process, program, and political policy success, the study of institutional design is necessary to understand if and when certain instruments may legally flow from institutions. One of the arguably less obvious, but most important, reasons why is because such study can shed light on the historical inertia that institutions and especially constitutional law carry forward to maintain the institutional status quo.

Indeed, constitutional analysis would fit quite well within the recent direction of policy design studies, which have analyzed “policy regime logics” and “governance modes.” Scholars have noted that because “governance modes typically change only very slowly over time, patterns of government instrument choices tend to exhibit a surprising amount of similarity within policy sectors and over time.”<sup>136</sup> Thus, once a governance mode is established via constitutional text, it is very difficult to change, and certain policy designs may be restricted or otherwise limited in scope until a change in the constitutional status quo occurs. So, for example, constitutional design that allows unfettered state authority over land-use or subnational forest policy, thus restricting the use of prescriptive instruments at the federal level, can lock in the use of lax (or perhaps no) protections of natural capital within state or local government jurisdictions in the absence of changes in constitutional structure (allocation of governance authority)—a regime logic the modification of which is a daunting task given the history of subnational government authority over land use and forests in the United States. Even so, a change in the governance mode may become necessary to forge a new trajectory for the policy instruments chosen and for their design. In fact, constitutions may very well be the prime example of how regime logics and governance modes maintain instrument choice and policy design inertia, even in the face of evidence that better process, program, and political success could be achieved with an adjustment to constitutional institutions.

Ultimately, two of the most important “policy contexts” for policy design and its relative success may very well be constitutional

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136. *Id.* at 140 (citations omitted).

allocation of governance authority and limits on a government's ability to restrict certain individual rights—after all, policies may not be successful without recognizing these constraints. In this way, “[t]here is a temporal aspect to . . . policy designs [sic] contexts . . . which policy designers must also take into account,” and “the leeway or degree of manoeuvrability [sic] policy designers have in developing new designs is influenced not only by existing contextual factors and polity features but also by historical-institutionalist ones.”<sup>137</sup> While it may be that these statements refer to historical *mixes* of specific policy instruments—prescriptive regulation, taxes, subsidies, market-based tools, public disclosure, and so on—this analysis remains no less true of the institutions that lay the framework for allowable policy instruments and their mixing. In other words, constitutional inertia segmenting authority in a way that fragments policy making between levels of government or locking in a particular conception of government intrusion into individual rights constrains the leeway policy designers have in adjusting that constitutional structure—primarily because it requires much more than a simple majority to change constitutional rules. For example, changing institutional design in the United States either requires explicit changes to constitutional text by a “super-supermajority,”<sup>138</sup> so to speak, or a radical departure from precedential judicial interpretation of constitutional text.

Each of these factors makes change in institutional design an exceedingly difficult task. Nonetheless, policy design study maintains a broad goal of “constructing an inventory of potential public capabilities and resources that might be pertinent in any problem-solving situation.”<sup>139</sup> Review of institutional design through a process we might call “institutional authority analysis” should be included in this inventory. This analysis would assist policy makers in assessing the government's institutional capacity to create policy on particular scales of governance so that it can remedy the institutional deficiency

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137. *Id.* at 144; accord Tom Christensen, Per Lægreid & Lois R. Wise, *Transforming Administrative Policy*, 80 PUB. ADMIN. 153 (2002).

138. See *infra* text accompanying note 170. See generally U.S. CONST. art. V (describing the process for amending the U.S. Constitution); Blake Hudson, *Fail-Safe Federalism and Climate Change: The Case of U.S. and Canadian Forest Policy*, 44 CONN. L. REV. 925 (2012) (arguing that governments can remedy constitutional deficiencies to improve climate and forest governance).

139. Charles W. Anderson, *Comparative Policy Analysis: The Design of Measures*, 4 COMP. POL. 117, 122 (1971).

should the value of the desired policy outweigh the value in maintaining the institutional status quo.

*D. Instrument Choice and Institutions: Constitutions as “Meta-Instruments” and “Policy Supersystems”*

*Innovative and effective policy design requires that the parameters of instrument choice be well understood, both to reduce the risk of policy failure and to enhance the probability of policy success.*<sup>140</sup>

Policy instruments may be thought of as the “contents of the toolbox from which governments must choose in building or creating public policies,” and therefore are an inherent part of policy design.<sup>141</sup> Policy instruments are likely to be networked with a number of other instruments in a set of “policy mixes.”<sup>142</sup> Importantly, of course, these mixes can occur across scales at different levels of government. This is a fact that has not gone entirely unnoticed in policy studies, with scholars noting that federal systems in particular “guarantee these sorts of intertwined arrangements in virtually all policy sectors.”<sup>143</sup> Even so, this acknowledgment deals primarily with the politics of federalism in complicating policy responses, rather than focusing on the legal, institutional complications posed by federalism or the interpretation of constitutional provisions related to individual rights.<sup>144</sup> As Arthur Ringeling acknowledges, “The question of legality of public policy is perhaps one of the oldest questions about public policy. But amazingly, for a long time it was almost fully absent from the policy sciences.”<sup>145</sup> Stated differently:

Practitioners of the policy sciences almost forgot that governments are not free in the instruments they select. . . . [G]overnments [cannot] act without an adequate legal foundation in the law. . . .

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140. Michael Howlett, *What Is a Policy Instrument?*, in *DESIGNING GOVERNMENT: FROM INSTRUMENTS TO GOVERNANCE*, *supra* note 1, at 31, 49.

141. HOWLETT, *supra* note 97, at 22.

142. Hans Th. A. Bressers & Laurence J. O’Toole, Jr., *Instrument Selection and Implementation in a Networked Context*, in *DESIGNING GOVERNMENT: FROM INSTRUMENTS TO GOVERNANCE*, *supra* note 1, at 132, 135-37.

143. *Id.* at 137.

144. *Id.* at 138-39, 146-47. Bressers and O’Toole come close to providing a home for analysis of legal aspects of policy mixes when they note that one important factor in determining the efficacy of instruments is to consider whether multiple levels of government are at play, and if so, “[h]ow is the interaction between various levels of governance organized?” *Id.* at 146. Clearly, this organization arises from constitutional authority at both the national and state levels.

145. Arthur B. Ringeling, *Instruments in Four: The Elements of Policy Design*, in *DESIGNING GOVERNMENT: FROM INSTRUMENTS TO GOVERNANCE*, *supra* note 1, at 185, 187.



So the possibilities available to policy makers in choosing between different instruments are to an important extent limited by considerations of legality. The amazing thing is that practitioners of the policy sciences seem to have forgotten this consideration when they developed ideas about optimal instrument choice.<sup>146</sup>

Policy scholars have at least begun the journey down this road, acknowledging in a preliminary manner the complicating effect of federal systems on instrument choice and noting that “[o]ne of the most significant aspects of the political system affecting public policy is whether it is federal or unitary.”<sup>147</sup> These scholars argue that in unitary systems “the existence of a clear chain of command or hierarchy linking the different levels of government together in a superordinate/subordinate relationship reduces the complexity of multi-level governance and policy-making.”<sup>148</sup> Thus, in nations like Britain, France, and Japan, “the national government retains all decision-making powers,” and “[i]t can choose to delegate these powers to lower levels of government or dictate to them, but the role of the central, national government is legally unchallenged.”<sup>149</sup> Federal political systems, like Australia, Brazil, India, Russia, Canada, and the United States, of course, maintain multiple levels of government and “are not bound together in a superordinate/subordinate relationship but, rather, enjoy more or less complete discretion in matters under their jurisdiction and guaranteed by the constitution.”<sup>150</sup> Scholars have attributed “weak policy capacity” in certain sectors in the United States and Canada to federalism<sup>151</sup> and in particular note the complications posed when each level of government in a federal system is “subject to unpredictable judicial review of their measures, which further restricts governments’ ability to realize their objectives.”<sup>152</sup> As a result, “Federalism thus makes public policy-making a long, drawn-out, and often rancorous affair as the different governments wrangle over jurisdictional issues or are involved in extensive intergovernmental negotiations or constitutional litigation.”<sup>153</sup> This wrangling driven by constitutional federalism has a marked impact on instrument choice.

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146. *Id.* at 198-99.

147. HOWLETT, RAMESH & PERL, *supra* note 31, at 59.

148. *Id.*

149. *Id.*

150. *Id.* See generally Hudson, *Regulating Climate Change*, *supra* note 61.

151. HOWLETT, RAMESH & PERL, *supra* note 31, at 60.

152. *Id.*

153. *Id.*

The field of instrument choice has been described by scholars as “a commitment to understanding policy formulation and implementation, as well as the policy-making process itself, by focusing on instruments of government action rather than on policies and programs.”<sup>154</sup> Recent research has been aimed at “improving the knowledge framework for evaluating instruments and at providing better knowledge about how they contribute to government performance overall” to achieve “the fundamental objective of good instrument choices: good governance.”<sup>155</sup> These instruments may include prescriptive regulation, subsidies and taxation, privatization, and information dissemination.<sup>156</sup> Each of these involve either the use or express limitation of state authority.<sup>157</sup>

While instrument choice scholars have demonstrated interest in the nature of regulatory institutions as a general matter,<sup>158</sup> one of the reasons why legal institutions, like constitutions, have been left out of the study of instrument choice is that the field seems to be dominated by political scientists and economists,<sup>159</sup> and not legal scholars per se. Regardless, policy scholars have queried, “What are the constraints and impediments blocking optimal instrument use in the design and implementation of governance strategies?”<sup>160</sup> One of those constraints is constitutional and should be more fully integrated into our understandings of instrument choice.

In fact, we can describe constitutions as “meta-instruments” that have the decisive impact on the choice of other instruments, as they may make the use of certain instruments, such as prescriptive regulation, unavailable to policy makers at one or more levels of government.<sup>161</sup> Instrument choice theory, while focusing on the instruments that arise out of institutions and how they may or may not be used to steer policy, has not been sufficiently expanded to study

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154. Pearl Eliadis, Margaret M. Hill & Michael Howlett, *Introduction* to *DESIGNING GOVERNMENT: FROM INSTRUMENTS TO GOVERNANCE*, *supra* note 1, at 3, 4.

155. *Id.* at 7.

156. *Id.* at 4; *see also* JAMES RASBAND, JAMES SALZMAN & MARK SQUILLACE, *NATURAL RESOURCES LAW AND POLICY* 69-77 (2d ed. 2009) (describing the common tools used to manage natural resources).

157. Howlett, *supra* note 140, at 31.

158. Margaret M. Hill, *Tools as Art: Observations on the Choice of Governing Instrument*, in *DESIGNING GOVERNMENT: FROM INSTRUMENTS TO GOVERNANCE*, *supra* note 1, at 21, 28; *see also* *CHANGING REGULATORY INSTITUTIONS IN BRITAIN AND NORTH AMERICA* (G. Bruce Doern & Stephen Wilks eds., 1998) (discussing the importance of political and institutional regulation).

159. Howlett, *supra* note 140, at 31.

160. *Id.* at 34.

161. *See* Hudson & Rosenbloom, *supra* note 21.

meta-instruments like constitutions. After all, constitutions give rise to all other instruments. Not only do they lay the groundwork for governmental authority (at different levels) to prescriptively regulate,<sup>162</sup> but they also establish spending powers that facilitate subsidies;<sup>163</sup> taxing powers that facilitate taxation;<sup>164</sup> powers related to the creation, protection, and regulation of private property rights;<sup>165</sup> and a suite of powers that may be used to incentivize or compel information dissemination from government entities<sup>166</sup> or private parties.<sup>167</sup>

A home for constitutions as meta-instruments is not without at least cursory contemplation within the literature. We might consider constitutions as falling within the procedural instrument category of instrument choice theory, which includes institution creation and reform.<sup>168</sup> The specific policy instruments chosen by policy makers and the processes through which they utilize them are termed “subsystems.”<sup>169</sup> Constitutions, then, are the “policy supersystems” within which policy subsystems are situated. In this way, change to the policy supersystem of constitutional governance may necessitate the use of policy subsystems to achieve institutional or constitutional reform. So, for example, one way to change the structure of the constitutional supersystem in the United States is to have either two-thirds of both houses of Congress or two-thirds of state governments propose a constitutional amendment, which then must be ratified by three-quarters of state governments.<sup>170</sup> This is action that utilizes procedural instruments within a policy subsystem to adjust the constitutional supersystem. Without such an adjustment, the constitutional supersystem may constrain the use of certain instruments like prescriptive regulation at certain levels of government.

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162. Such as through the Commerce Clause. U.S. CONST. art. I, § 8, cl. 3.

163. *Id.* art. I, § 8, cl. 1.

164. *Id.* art. I, § 8, cl. 3.

165. *Id.* amend. V. The powers of eminent domain, common law doctrines like nuisance and the public trust doctrine, and powers based on the state’s police power to protect the public, like zoning authority, provide other examples. *See generally* Hudson, *Nested Commons Governance*, *supra* note 61 (describing the operation of nested natural capital commons created by some federal structures).

166. *See* National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 (2012).

167. In the environmental context, ecolabeling requirements provide an example. RASBAND, SALZMAN & SQUILLACE, *supra* note 156, at 74.

168. Howlett, *supra* note 140, at 36.

169. *Id.* at 38.

170. U.S. CONST. art. V. Another way to adjust the constitutional superstructure is through new judicial interpretations of constitutional text.

Just as with policy design more broadly, policy scholars of the sociological and historical neoinstitutionalism mold have keyed on the role of institutions in guiding instrument choice, noting that “[t]he choice of policy instruments depends on the institutional context of the actors involved.”<sup>171</sup> Constitutional federalism is clearly the concrete context in which policy making occurs across scales in countries like the United States and Canada, and the decentralized governance promoted by this more potent form of federalism (being constitutional rather than merely political in form) dictates many of the policy-tool trade-offs in a variety of subject areas, including private forestry, nonpoint source pollution, and land-use planning more generally.

Furthermore, this institutional context explains why constitutional structure and value preference for relatively strong decentralized federalism in these subject areas is so hard to change: “instrument (re)design is never an isolated choice; it is always linked to a historical process.”<sup>172</sup> In this way, “The rationality of participants in the [policy] design process is not only rationally bounded, but also bound to an institutional context.”<sup>173</sup> Thus, institutional context combined with rationality might be considered a form of “reasonable rationality.”<sup>174</sup> The dilemma presented by reasonable rationality is thus:

On the one hand, neglecting institutions may lead to unviable instruments that cannot be successfully advocated and implemented; on the other hand, designing in perfect conformity with existing institutions may drastically reduce the scope of instrument choices as well as the possibility of developing solutions contributing efficiently to induce changes in behaviour likely to solve problems . . . .<sup>175</sup>

This is the case, for example, in land-use regulatory areas in the United States, such as nonpoint source water pollution, subnational forestry, isolated wetlands, and direct land-use planning activities generally. In these areas, if we ignore constitutional constraints—for example, constraints on federal authority to prescriptively intervene with

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171. Réjean Landry & Frédéric Varone, *The Choice of Policy Instruments: Confronting the Deductive and the Interactive Approaches*, in *DESIGNING GOVERNMENT: FROM INSTRUMENTS TO GOVERNANCE*, *supra* note 1, at 106, 114; accord Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 *POL. STUD.* 936 (1996); Réjean Landry, *Rational Choice and Canadian Policy Studies*, in *POLICY STUDIES IN CANADA: THE STATE OF THE ART*, *supra* note 80, at 170.

172. Landry & Varone, *supra* note 171, at 114.

173. *Id.* at 115.

174. Asbjørn Sonne Nørgaard, *Rediscovering Reasonable Rationality in Institutional Analysis*, 29 *EUR. J. POL. RES.* 31 (1996).

175. Landry & Varone, *supra* note 171, at 115.

minimum standards in the event that subnational governments refuse to act—we might advocate for unviable instruments that ultimately fail for a number of reasons. First, the policy may not garner enough political support for enactment. Or, even if political support exists, the policy is passed by a legislature, and is even implemented by executive agencies, the policy might fail when challenged constitutionally by private property owners or subnational governments. On the other hand, if we were to develop instruments in line with a constitutionally dualistic institutional state of affairs,<sup>176</sup> then these instruments would not be robust enough to change behavior. We see this, for example, with regard to the numerous voluntary programs aimed at subnational forest and coastal resources that have been holistically ineffectual.<sup>177</sup>

Ultimately, though we tend to think about instrument choice in terms of “policy instrument choice,”<sup>178</sup> there is a precursor to that inquiry that can be termed “institutional instrument choice” or, perhaps more precisely, “constitutional instrument choice.” The choice of constitutional instrument dictates the availability of all other policy instruments, so evaluation of a constitutional instrument is a precondition to the evaluation of policy instruments if we are to gain a holistic approach to policy success and failure.

#### *E. Policy Success and Failure: Integrating Institutional Success*

Though there has been much study of policy failure,<sup>179</sup> policy success has gone virtually unnoticed in the literature.<sup>180</sup> Allan McConnell calls this oversight a “significant gap in our understanding of the world.”<sup>181</sup> As noted earlier, policy success theory to date has divided success into three categories: process, program, and political

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176. See Engel, *supra* note 41; Blake Hudson, *Reconstituting Land-Use Federalism To Address Transitory and Perpetual Disasters: The Bimodal Federalism Framework*, 2011 BYU L. REV. 991.

177. See the Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 (2012); section 319 of the Clean Water Act, 33 U.S.C. § 1329 (2012); and *Forest Legacy Program: Protecting Private Forest Lands from Conversion to Non-Forest Uses*, U.S. FOREST SERVICE, <http://www.fs.fed.us/spf/coop/programs/loa/aboutflp.shtml> (last visited Jan. 24, 2015), for examples and a discussion of voluntary conservation programs. See also Jessica Owley & Stephen J. Tulowiecki, *Who Should Protect the Forest?: Conservation Easements in the Forest Legacy Program*, 33 PUB. LAND & RESOURCES L. REV. 47 (2012) (discussing conservation easements in the forest legacy program).

178. Landry & Varone, *supra* note 171, at 107.

179. MCCONNELL, *supra* note 7, at 21.

180. *Id.* at 3 (noting that such scholarship is limited in scope and in number to a handful of projects).

181. *Id.*

success.<sup>182</sup> The aim of this Article, of course, is to integrate a fourth category, institutional success, into policy success theory.

Perhaps the most useful way to compare institutional success with prior success categorizations is to draw contrasts between institutional and program success, the latter of which is the primary way in which society thinks about policy successes and failures—that is, “did the policy work?” In many ways determining program success is fraught with far more subjectivity than determining institutional success. Reasonable people may disagree over whether the substance of a particular policy resulted in outcomes that matched the policy’s goals. This is particularly true when policies will rarely, if ever, be forged out of unanimous consent. A large number of detractors who never agreed with the substance of the policy to begin with will likely continue to view it as a failure, even if it does achieve some or all of its original aims. Likewise, supporters may view, through rose-colored glasses, an objectively weak policy as a success. Consider the continued characterization of Obamacare as a success by supporters<sup>183</sup> and as a failure by detractors.<sup>184</sup> This adds political distortion on top of the already difficult task of objectively weighing a policy’s programmatic results against its purported goals.

Policy scholars have noted the difficulties in evaluating program success or failure. Should success be evaluated in a subjective, value-laden manner (a success to those in favor of the policy and a failure to those opposed to it)<sup>185</sup> or in an objective and impartial manner (did the policy achieve what it set out to achieve and maximize benefits relative to costs)?<sup>186</sup> The latter may be heavily data-driven and is an approach particularly favored among U.S. policy analysts.<sup>187</sup> Even so, is a policy a success if it achieves its original goals, but those goals were illegitimate?<sup>188</sup> Such may be the case, for example, if a policy is seen

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182. *Id.* at 42-43, 46, 49-54; *see also* Parsons, *supra* note 13, at 43-60 (arguing that evidence-based policy making enhances control of the policy-making process); Sanderson, *supra* note 13 (arguing that evidence-based policy making should include theory-based analysis of long-term impact).

183. *Biden on Health Care Sign-Ups: ‘Hell of a Start,’* CNN (Feb. 20, 2014, 9:40 AM), [http://politicalticker.blogs.cnn.com/2014/02/20/biden-on-health-care-sign-ups-hell-of-a-start/?hpt=hp\\_t2](http://politicalticker.blogs.cnn.com/2014/02/20/biden-on-health-care-sign-ups-hell-of-a-start/?hpt=hp_t2).

184. Josh Kraushaar, *Democrats in Denial over Obamacare*, NAT’L J. (Feb. 18, 2014), <http://www.nationaljournal.com/against-the-grain/democrats-in-denial-over-obamacare-2014-0218>.

185. McConnell calls this the antifoundationalist position. MCCONNELL, *supra* note 7, at 31.

186. McConnell calls this the foundationalist position. *Id.*

187. *Id.* at 12-13.

188. *Id.* at 14.

as creating economic inequalities or compromising democratic processes.<sup>189</sup> A further complication of determining program success or failure is that in the typical policy scenario a policy that is not considered a success is not necessarily a failure—policies can succeed in some ways but not in others and can be characterized as succeeding mostly or only in part. Indeed, McConnell describes a spectrum from success to failure, noting that success is not an “all or nothing phenomenon” and that “[t]otal policy success is uncommon, as is total policy failure.”<sup>190</sup>

Contrast the subjectivity-fraught evaluation of program success with the type of institutional success upon which this Article focuses, which involves a relatively straightforward determination: did the level of government (federal, state, or local) guiding the policy through the policy cycle have the legal authority to craft the policy in the first instance? Did the government unconstitutionally infringe upon legally protected individual rights? Determining whether legal authority exists or whether a constitutional right was infringed can certainly be litigious affairs, as proponents of the policy make arguments that a law or its application is constitutional and opponents make counterarguments that it is not. Once a determination is made, however, we can have a relative degree of certainty regarding whether a policy institutionally succeeds (that is, is allowed to proceed in its current form). Such a determination may occur in a number of ways and quite often occurs at the evaluation stage through a judicial ruling. It may also occur if a legislative body withdraws a policy due to the mere threat of legal challenge or because of political backlash. In this way, analysis of constitutional authority as the focus of institutional success may be a much neater analysis than determination of program success because *post-judicial ruling*, there are no gradations along an institutional success/failure spectrum (unless, of course, the judicial ruling is later overturned—which is certainly a possibility and can make institutional success evaluation much messier). Institutional success evaluation, therefore, may simplify the otherwise overwhelmingly complex task of policy evaluation<sup>191</sup>—a policy may

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189. Examples might be tax policies characterized as exacerbating wealth disparity in the United States, see Jillian Berman, *Income Inequality Greatly Exacerbated By U.S. Tax System: Study*, HUFFINGTON POST (June 17, 2013, 1:33 PM), [http://www.huffingtonpost.com/2013/06/17/income-inequality-tax-system\\_n\\_3454216.html](http://www.huffingtonpost.com/2013/06/17/income-inequality-tax-system_n_3454216.html), or corporations having the same constitutionally protected right to participate in campaign contribution activities as do individual citizens, see *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

190. MCCONNELL, *supra* note 7, at 55.

191. See *id.* at 160-95.

either institutionally fail with 100% certainty if it is found that a level of government maintains no authority or unconstitutionally infringes on individual rights, or it may institutionally succeed with 100% certainty. A new debate may ensue subsequent to that determination to try to adjust those outcomes, and new arguments regarding constitutional interpretation may be put forth and eventually accepted.<sup>192</sup> But for the time after a judicial ruling until a change in such ruling, a policy's institutional success or failure is determinable.

Not only may institutional success analysis be more clean-cut, but it also may provide more information regarding the viability of policies across a wide range of subject matter. McConnell posits that there are numerous reasons why the study of policy success is important, including discerning insights regarding “the transferability of conditions for success to other sectors and jurisdictions[,] the capacity of successful programmes to be enduring[,] whether we are more liable to learn from successes or failures[, and] our ability to predict success.”<sup>193</sup> While each of these insights may be of varying degrees of utility regarding program success, because there are so many variables distinguishing the substance of differing policies, the utility of these insights for an assessment of institutional success is more straightforward. With this Article's narrow definition of institutional success—that is, legal authority for a level of government to craft and implement a particular regulatory policy without constraint—these propositions form into something more definite. First, once there is a judicial ruling on constitutional authority or a constitutional change in an institution to reallocate legal authority, we gain fairly direct understandings of how to apply that constitutional principle or change that institution in other contexts. As Allan McConnell notes, there is an argument that in the “federal states versus unitary states” category of political science study “any two countries . . . might share substantial similarities. Hence, there is some chance, all things being equal, that what works in one context will be of value in another.”<sup>194</sup> This is definitely the case as between the United States and Canada, for example, where the constitutional constraints on one federal government in the subnational forest management context may tell us a great deal about those constraints in the other country.<sup>195</sup> Second, we

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192. See Brigham Daniels & Blake Hudson, *Our Constitutional Commons*, 49 GA. L. REV. (forthcoming 2014).

193. MCCONNELL, *supra* note 7, at 196.

194. *Id.* at 200.

195. See Hudson, *supra* note 138.



also learn with some degree of certainty whether a policy program will be enduring—if there is no legal authority, then we know that it will not endure. If there is legal authority, then overall endurance depends on a number of other factors related to programmatic and political success. Third, as noted earlier, in the institutional context success and failure are more directly characterized as flip sides of the same coin. If there is no legal authority to act, then we learn equally from this as both a lack of success and as a failure. And finally, what we learn about constitutional conflicts and institutional design characteristics can help us predict ways to achieve institutional successes in the future.

In the final analysis, because the rules for processes, programs, and politics ultimately emanate from constitutions, establishing successful institutions is critical to the success of the other dimensions. While institutional authority for a certain level of government to formulate policy cannot guarantee process, program, or political success, lack of institutional authority can guarantee policy failure, at least *in that form and at that level of government*. It guarantees failure in that form because a government could certainly utilize nonprescriptive, voluntary measures as the policy instrument or pay compensation to private property owners if it is able to do so. In other words, there are other policy forms the government could utilize. Lack of institutional authority guarantees failure at that level of government because the same policy, if prescriptive, may be adopted by other levels of government. Even so, nonprescriptive approaches may not be efficacious, governments may not be able to pay just compensation and may abandon the policy, and other levels of government may not engage in policy making on that subject matter.

With constitutional authority as the focus, what must be determined is whether it does or does not exist and whether its exercise does or does not infringe on constitutionally protected rights. So, for example, if the federal government is found not to have constitutional authority to maintain prescriptive inputs into certain regulatory areas, then both proponents and opponents would see attempts by the federal government to so regulate as failures—proponents would do so begrudgingly while opponents would do so gladly. As McConnell describes:

A policy fails insofar as it does not achieve the goals that proponents set out to achieve. Those supportive of the original goals are liable to perceive, with regret, an outcome of policy failure. Opponents are also

likely to perceive failures, with satisfaction, because they did not support the original goals.<sup>196</sup>

Take the case of *Morrison* as an illustration. Proponents of the Violence Against Women Act would reluctantly admit that the policy had institutionally failed due to the Supreme Court's finding of a lack of federal constitutional authority (though they may disagree with that judicial interpretation). Those opposed to the policy and the corresponding expanded degree of federal authority would also perceive the policy as a failure—and justifiably so in their view. Integrating institutional analysis earlier in the policy cycle can help governments turn these types of institution-driven policy failures into policy successes. These policy successes, in turn, can tell us a great deal more about better policy making in the future than can ex post analysis of policy failures.

#### IV. IMPLICATIONS OF INSTITUTIONAL VULNERABILITIES FOR POLICY SUCCESS: COASTAL ZONE AND PRIVATE FOREST MANAGEMENT CASE STUDIES

The mechanisms this Article develops for integrating institutional analysis into the policy success framework may be applied to a wide variety of policy subject areas, from civil rights to intellectual property to international law and beyond. They can also be applied to a variety of national governance structures—in particular, federal systems with constitutional constraints similar to those in the United States. There are two areas in the United States where vulnerabilities are likely to play a substantial role in impeding policy success. These subject areas are within the environmental policy and land-use planning arenas and include the role of coastal land-use planning and subnational forest management in responding to climate change. Remedying institutional vulnerabilities in these areas will be critical if society is to design policies that both mitigate and adapt to climate change effects in the coming decades.

##### A. *Land Use in the Coastal Zone*

As described in this Subpart, new approaches to land-use planning in the coastal zone will be critical to adapting to climate change effects. As sea levels rise and disaster events like hurricane-induced flooding increase, municipalities, industrial developments,

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196. MCCONNELL, *supra* note 7, at 56.

and other entities in close proximity to the coast must make difficult choices on how to adapt to the inevitably rising tide. Society will not only need to move away from vulnerable parts of the coast, but when settlement or development occurs further inland, it will need to proceed in a new way. Society must learn from the development mistakes of the past and establish new, more robust buffer zones between the new coastline and future development. Society will also need to set aside more natural capital in developments through better use of density requirements or urban growth boundaries. Such new and, some would say, radical approaches to land-use planning will be necessary if society is to forestall the worst effects of climate change in the coastal zone, which currently is home to more than half of the U.S. population.<sup>197</sup>

Coastal land-use planning implicates both types of constitutional vulnerability highlighted in Part II. First, direct land-use planning in the United States exemplifies constraints on governance authority at various levels of government perhaps better than any other subject matter. In the United States, the regulatory authority to engage in direct land-use planning on private lands, which is critical to controlling development, reigning in urban sprawl, and protecting natural capital, is currently placed completely under the control of state governments (though it may be granted to local governments under home rule laws).<sup>198</sup> The Supreme Court has made reference to “the States’ traditional and primary power over land . . . use,”<sup>199</sup> describing land-use regulation as “a *quintessential* state and local power.”<sup>200</sup>

Congress actually exempts a number of activities from federal statutes in order to avoid federal “intrusion” into land-use planning. Consider the example of nonpoint source water pollution under the

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197. U.S. DEP’T OF COMMERCE, NAT’L OCEANIC & ATMOSPHERIC ADMIN., NAT’L OCEAN SERV.: POPULATION TRENDS ALONG THE COASTAL UNITED STATES: 1980-2008 (2004).

198. See *supra* text accompanying note 21; see also *Mugler v. Kansas*, 123 U.S. 623 (1887); JOHN R. NOLON, PATRICIA E. SALKIN & MORTON GITELMAN, *LAND USE AND COMMUNITY DEVELOPMENT* 17 (7th ed. 2008); Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 335 (2003); James R. May, *Constitutional Law and the Future of Natural Resource Protection*, in *THE EVOLUTION OF NATURAL RESOURCES LAW AND POLICY* 124, 132 (Lawrence J. MacDonnell & Sarah F. Bates eds., 2010).

199. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994), for the proposition that “regulation of land use [is] a function traditionally performed by local governments”).

200. *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (emphasis added) (citing *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (“[R]egulation of land use is perhaps the quintessential state activity.”)).

Clean Water Act, which is unregulated at the federal level but also the greatest contributor to water quality impairment in the United States.<sup>201</sup> Again, federal hesitancy is due in part to conceptions of exclusive state and local authority over land-use regulation,<sup>202</sup> leaving states as the “exclusive regulators of nonpoint source pollution.”<sup>203</sup> The role of nonpoint source water pollution regulation in complicating the policy-making process has been highlighted in the policy studies literature.<sup>204</sup> Policy scholars have used the case study of nonpoint source pollution to explore the many characteristics that define particular policy problems,<sup>205</sup> which can tell us much about coastal land-use planning more generally. One of these characteristics is “interdependencies,” which implicates whether a problem cuts vertically across scales of governance or horizontally across agencies within the same level of governance. The interdependencies in coastal land-use planning related to climate change are vast, as the problems cut vertically across scales of governance and horizontally across entities within the same level of governance.

In fact, the issue of interdependencies is of particular relevance to the role of constitutions in the policy-making process. Scholars have noted that land-use planning (such as the control of nonpoint source water pollution) gives rise to more interdependencies than other policy areas, primarily because it cuts across a variety of sectors, such as environmental protection, commercial and residential development, agriculture, forestry, and local zoning. In this way, land-use planning is a problem that is especially prone to cutting vertically across scales—the federal government is implicated in agricultural policy while state and local governments are responsible for land-use planning and zoning—as well as horizontally across federal agencies and thousands of subnational governments within the same scale. The role of governance authority across and within scales is significant and is perhaps *the* ultimate backdrop to the intractability of the coastal land-use problem. State and local governments perceive a sphere of

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201. *Nonpoint Source Pollution: The Nation's Largest Water Quality Problem*, ENVTL. PROTECTION AGENCY, <http://water.epa.gov/polwaste/nps/outreach/point1.cfm> (last visited Jan. 24, 2015).

202. Douglas R. Williams, *When Voluntary, Incentive-Based Controls Fail: Structuring a Regulatory Response to Agricultural Nonpoint Source Water Pollution*, 9 WASH. U. J.L. & POL'Y 21, 27 (2002).

203. Robin Kundis Craig, *Local or National? The Increasing Federalization of Nonpoint Source Pollution Regulation*, 15 J. ENVTL. L. & LITIG. 179, 179 (2000).

204. Peters & Hoornbeek, *supra* note 99, at 86-105.

205. *Id.* at 86-99.

land-use regulatory authority protected from federal interference, and thus far, the federal government has been unwilling to test that assertion of constitutional authority.

Though policy scholars have overlooked the role of constitutional federalism in driving the failure to craft nonpoint source water pollution policies, “the current move toward decentralized and nonregulatory policy instruments in nonpoint-source water-pollution control may find grounding in the political and causal complexity of the problems involved, in their broad scope, and in their significant policy interdependence.”<sup>206</sup> The same may be said of coastal land-use planning in a time of climate change. If state and local governments continue to act individually rational but collectively deficient in efforts to adapt, then needed adjustments in development patterns are unlikely to occur, increasing the risk of human, economic, and natural capital losses as sea levels rise. The federal government will likely need to step in and coordinate retreat from the most vulnerable areas. If it is unable to do so, then an unmitigated policy failure looms on the horizon.

Yet, it is not only constitutional constraints on federal authority that expose the governance authority constitutional vulnerability in the coastal land-use planning context. The federal government has made attempts to quash state and local authority over zoning authority for the siting and permitting of oil refineries and other utilities,<sup>207</sup> and states have succeeded in stripping local governments of authority to do so.<sup>208</sup> Each of these categories of action is based on claimed constitutional powers of preemption. This could have damaging impacts on the abilities of *lower* levels of government to move infrastructure out of high-risk areas or to preserve natural capital as a buffer to climate-related disaster events. In other areas, local governments are losing autonomy that could be useful for adapting to climate change through land-use planning as states are “transfer[ing] authority over armoring from local to state control.”<sup>209</sup> Each of these governance authority

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206. *Id.* at 104.

207. See Gasoline for America’s Security Act of 2005, H.R. 3893, 109th Cong. § 102(b)(1) (2005); Engel, *supra* note 41, at 185.

208. See Energy Mgmt. Corp. v. City of Shreveport, 467 F.3d 471 (5th Cir. 2006); State *ex rel.* Morrison v. Beck Energy Corp., 2013-Ohio-356, 989 N.E.2d 85.

209. J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69, 97 n.127 (2012) (citing Connecticut’s Act Concerning the Coastal Management Act and Shoreline Flood and Erosion Control Structures, S.B. 376, 2012 Reg. Sess. (Conn. 2012); Maryland’s Living Shoreline Protection Act of 2008, MD. CODE ANN., ENVIR. § 16-201 (West 2014)).

vulnerabilities needs to be remedied in order to facilitate coastal land-use planning policy successes.

The individual rights vulnerability plays a particularly acute role in land-use planning in the coastal zone, especially as related to climate change adaptation. Consider the *Lucas* case described in Part II.B. If states or municipalities wish to prevent further development in areas likely to be inundated, and doing so wipes out certain forms of economic development value of a landowner's property, the government would be hard-pressed to defend a takings claim. Peter Byrne has highlighted a number of other ways in which this vulnerability may play out.<sup>210</sup> Takings claims may be brought by property owners if the state renourishes beaches and claims the reclaimed beach as public property;<sup>211</sup> regulations prohibit property owners from armoring their properties to combat rising seas;<sup>212</sup> governments construct levees that send floodwaters to other properties;<sup>213</sup> governments *refuse* to construct levees to protect some property owners even though they construct them for others;<sup>214</sup> governments find it necessary to breach levees in certain locations to avoid worse flood damage elsewhere;<sup>215</sup> state or local governments mandate retreat from rising seas by "prohibiting, limiting, or conditioning new development or rebuilding" (as was the case in *Lucas*);<sup>216</sup> or governments fail to maintain access to "marooned" property by refusing to rebuild roads or bridges that are continually wiped away through erosive forces or other storm and sea level rise impacts.<sup>217</sup> Ultimately, as with the governance authority vulnerability, this constitutional rights institutional vulnerability will need to be remedied in order to achieve coastal land-use planning policy successes and to avoid the worst impacts of climate change along the coast.

### *B. Subnational Forestry*

Forests are critical to combatting climate change. Twenty percent of yearly carbon emissions worldwide over the last few decades are

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210. See Byrne, *supra* note 209.

211. *Id.* at 82 (discussing *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010)).

212. *Id.* at 88, 100-01.

213. *Id.*

214. *Id.* at 91-92.

215. *Id.* at 91.

216. *Id.* at 97.

217. *Id.* at 103-04.

attributable to deforestation and forest degradation.<sup>218</sup> Forest cover in the United States has been fairly stable over the past century,<sup>219</sup> but new threats loom. For example, the United States Forest Service's 2011 Southern Forests Futures Project Summary Report<sup>220</sup> detailed that population growth, climate change, changes in timber markets, and invasive species will remove copious amounts of forest resources in the coming decades.<sup>221</sup> Urban development in particular is projected to consume thirty to forty-three million acres of southern land by 2060, while contributing to total forest losses of up to twenty-three million acres, which is approximately 13% of all southern forestland.<sup>222</sup> A key driver of these threats is the combination of lax land-use planning in the South and the fact that 86% of southern forests are privately owned.<sup>223</sup> Sixty percent of forests are privately owned nationwide, and the federal government only maintains direct inputs into the 35% of U.S. forests in federal ownership.<sup>224</sup>

The division of governance authority between state and federal governments in the area of land-use planning, thoroughly discussed in the previous Subpart, plays a key role in preventing the federal government from curbing state rationality in this area. As Gerald Rose has noted, "Under the US Constitution, the federal government has limited authority and responsibility; all other powers are reserved for the states. Forestland management and use was one such reserved power."<sup>225</sup> In other words, regulation of 60% of U.S. forests and protection of those resources from urban sprawl and other development or resource extraction impacts is the responsibility of fifty states and nearly 88,000 subnational governments in the United

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218. CONSTANCE L. McDERMOTT, BENJAMIN CASHORE & PETER KANOWSKI, *GLOBAL ENVIRONMENTAL FOREST POLICIES: AN INTERNATIONAL COMPARISON* 6 (2010).

219. RASBAND, SALZMAN & SQUILLACE, *supra* note 156, at 1198-1200.

220. David N. Wear & John G. Greis, *The Southern Forest Futures Project: Summary Report*, USDA S. FOREST FUTURES (May 12, 2011), [http://www.srs.fs.usda.gov/futures/reports/draft/summary\\_report.pdf](http://www.srs.fs.usda.gov/futures/reports/draft/summary_report.pdf). The report reviewed thirteen states: Alabama, Arkansas, Georgia, Florida, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia. *Id.* at 4 fig.1.

221. *Id.* at 4.

222. *Id.* at 35. See generally Blake Hudson, *Dynamic Forest Federalism*, 71 WASH & LEE L. REV. 1643 (2014) (discussing the destruction of southern forests).

223. Wear & Greis, *supra* note 220, at 62.

224. U.N. ENV'T PROGRAMME, *GLOBAL ENVIRONMENT OUTLOOK 3: PAST, PRESENT & FUTURE PERSPECTIVES* 110 (2002).

225. Gerald A. Rose et al., *Forest Resources Decision-Making in the US, in THE POLITICS OF DECENTRALIZATION: FORESTS, PEOPLE AND POWER* 238, 239 (Carol J. Pierce Colfer & Doris Capistrano eds., 2005); accord JAN G. LAITOS ET AL., *NATURAL RESOURCES LAW* 849 (2006).

States<sup>226</sup>—absent any federal regulatory forest-management inputs. Whether these constitutional constraints on federal authority are real or illusory is uncertain because it is unclear if the federal government cannot legally act, or if rather it simply refuses politically to act out of perceived legal constraints. Regardless, the institutional vulnerability remains.

The interrelation between land-use planning and forest management has become far more complicated in recent decades, even as climate change has brought attention to the growing importance of forest resources. Between 1998 and 2010, large commercial timber companies in the southeastern United States have rapidly divested their timber holdings, resulting in smaller forested properties that are “subject to new dynamic forces that encourage parcelization and fragmentation.”<sup>227</sup> This transition has been described as “the most substantial transition in forest ownership of the last century,” as industry sold nearly three-quarters of its forest holdings.<sup>228</sup> Much of this forestland was purchased by real estate investment trusts (REITs).<sup>229</sup> Most REITs are interested primarily in the commercial value of the *land* upon which the timber exists for commercial, residential, or industrial development.<sup>230</sup> The timber is merely incidental to property ownership, and as a result these forestlands are now subject to increased development pressures seeking to replace forest resources with urban sprawl.<sup>231</sup>

If a large number of states continue to refuse to protect forest resources from the impacts of urban sprawl and other development over the next fifty years, the federal government will need to do so. Such protections may necessarily seek to “keep forests forested” through the use of regulatory instruments like growth boundaries and limit lines around large municipalities,<sup>232</sup> development-density requirements establishing preservation of forests on certain acreages of property,<sup>233</sup> or stand-density and clear-cutting requirements aimed at

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226. BARBARA A. BARDES, MACK C. SHELLEY II & STEFFEN W. SCHMIDT, *AMERICAN GOVERNMENT AND POLITICS TODAY* 89 (2010).

227. Wear & Greis, *supra* note 220, at 58.

228. *Id.* at 60, 62.

229. *Id.* at 60.

230. Carol Whitlock, *An Industry Always in Transition*, 16 COMPASS 1, 3 (2010).

231. *Id.*

232. *Rural Development in Oregon*, OR. DEP’T LAND CONSERVATION & DEV., [http://www.oregon.gov/LCD/pages/ruraldev.aspx#Rural\\_Development\\_in\\_Oregon](http://www.oregon.gov/LCD/pages/ruraldev.aspx#Rural_Development_in_Oregon) (last visited Jan. 24, 2015).

233. *Forest Conservation Ordinance*, WASH. CNTY., MD., DEP’T PLANNING & ZONING, <http://www.washco-md.net/planning/forest.shtm> (last visited Jan. 24, 2015).



industries engaged in forestry activities,<sup>234</sup> among a variety of other prescriptive policies. Yet, these are regulatory roles currently reserved to subnational governments.<sup>235</sup> And in many areas, such as the U.S. South, the most basic of forest preservation standards are not even utilized—most southern states rely almost entirely on voluntary best management practices.<sup>236</sup> There are certainly arguments that the federal government might prescriptively reach these areas under its Commerce Clause power to establish a minimum standards framework,<sup>237</sup> but that premise simply has not been tested because Congress has never attempted to prescriptively regulate subnational forests.

Furthermore, as with land-use planning in the coastal zone, not only may the federal government be constrained by subnational actors, but local governments who wish to manage forests to combat climate change may be prevented from doing so if states preempt their management activities under the pretense of fostering commercial, residential, industrial, or other economic developments within their borders. These are each institutional vulnerabilities that may inhibit much needed forest management policy success in the coming decades.<sup>238</sup>

The constitutional infringement vulnerability, in the form of Fifth Amendment takings claims, could theoretically be implicated if federal, state, or local governments prohibit forest operations on smaller parcels or require certain stand-density requirements that would prohibit the cutting of virtually any trees. This is both an unlikely policy response and a claim that would be unlikely to succeed at the federal level if other economic values were preserved on the property.<sup>239</sup> At the state level, however, such claims may have even more purchase if states require compensation for regulations that devalue property by a certain degree.<sup>240</sup> A number of other difficult questions may arise. What if a REIT owns forested property outside a newly instituted growth boundary? Forest preservation regulations

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234. See Hudson, *supra* note 138.

235. *Id.* at 932-33.

236. See Hudson, *supra* note 138.

237. See Hudson, *supra* note 8.

238. See *Big Creek Lumber Co. v. County of Santa Cruz*, 136 P.3d 821 (Cal. 2006). Local regulation in this case was actually allowed to proceed despite claims of state preemption. Nonetheless, states may attempt to prevent local government regulation if they feel that such regulation might inhibit economic development activities within the state.

239. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

240. See FLA. STAT. § 70.001 (2014); sources cited *supra* note 58.

could effectively eviscerate almost all of the REIT's economic value in the land if they are unable to develop the property as originally planned or sell it to another for those purposes. So while this type of institutional vulnerability may be less cause for concern in the forest management context, its potential to undermine policy and institutional success remains.

## V. CONCLUSION

*Understanding the nature of a policy space and its history are prerequisites of successful design.*<sup>241</sup>

In many systems of government, policy making occurs within a policy space created by constitutional institutions. These institutions have a history and are driven by an inertia that affects the viability of certain regulatory instruments. If policy makers are constrained in utilizing those regulatory instruments by constitutional rules of governance or provision of individual rights, then important policies that have already been designed and implemented may fail or may not even be crafted in the first instance at appropriate levels of governance. Understanding these effects and adjusting constitutional institutions accordingly is a precondition for policy success.

To be clear, particular constitutional rules of governance or provisions of individual rights may certainly have had value at one time. Today, however, policy makers have new information regarding the supply, utilization, scientific function, and value of certain resources, like forests, wetlands, biodiversity, and other resources readily replaced by development. As a result, for certain regulatory areas, such as the intersection of land-use planning and natural resource protection, those constitutional rules and protections are outdated and archaic. Even though these institutions carry the heavy weight of historical inertia, such inertia “does not mean . . . that choices are inevitable or immutable or that substantial shifts in implementation styles do not occur.”<sup>242</sup> In other words, institutions like constitutions can change, either through textual changes to the constitution itself or through changes in constitutional interpretation.

This Article seeks to infuse constitutional analysis into the policy literature by framing constitutions as meta-institutions central to process, program, and political policy success. Integrating “institutional analysis” into the policy cycle literature, “institutional design”

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241. HOWLETT, *supra* note 97, at 145 (citing Schön, *supra* note 125).

242. Howlett, *supra* note 140, at 48.

into the policy design literature, “meta-instruments” into the instrument choice literature, and “institutional success” into the policy success literature will be necessary to forge a holistic understanding of policy making that is based more upon learning from success, rather than only from failure.